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2012 JUN 27 PM 3:11

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

WILLIAM TAYLOR,

Plaintiff,

v.

CITY OF BURBANK and DOES 1 through 100, inclusive,

Defendants.

Case No. BC 422252
Assigned to: Hon John L. Segal, Dept. 50

COMPENDIUM OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF DEFENDANT CITY OF BURBANK'S OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEYS' FEES

DATE: July 9, 2012
TIME: 8:30 a.m.
DEPT: 50

Trial Date: March 5, 2012
Action Filed: Sept. 22, 2009

Defendant City of Burbank respectfully submits the following Compendium of Non-California Authorities that are cited in its Opposition to Plaintiff's Motion for Attorneys' Fees filed concurrently herewith. True and correct copies of the referenced authorities are attached hereto as follows:

DATED: June 25, 2012

BURKE, WILLIAMS & SORENSEN, LLP
Ronald F. Frank
Robert J. Tyson

By: _____
Robert J. Tyson
Attorneys for Defendant
City of Burbank

Supreme Court of the United States
CITY OF BURLINGTON, Petitioner
v.
Ernest DAGUE, Sr., et al.

No. 91-810.
Argued April 21, 1992.
Decided June 24, 1992.

Property owners brought action alleging that city operated landfill in violation of Resource Conservation and Recovery Act (RCRA) and Clean Water Act (CWA). The United States District Court for the District of Vermont, Franklin S. Billings, Jr., Chief Judge, 733 F.Supp. 23, entered judgment for plaintiffs on statutory claims, reserved common-law claims for trial, and awarded attorney fees and expenses, and city appealed. The Court of Appeals, 935 F.2d 1343, affirmed, and certiorari was granted. The Supreme Court, Justice Scalia, held that enhancement of attorney fees awarded to prevailing party for contingency is not permitted under fee-shifting provisions of Solid Waste Disposal Act and Clean Water Act.

Reversed.

Justice Blackmun filed dissenting opinion in which Justice Stevens joined.

Justice O'Connor filed dissenting opinion.

Opinion on remand, 976 F.2d 801.

West Headnotes

[1] Attorney and Client 45 ⇐146.1

45 Attorney and Client
45IV Compensation
45k146 Contingent Fees
45k146.1 k. In general. Most Cited Cases
(Formerly 45k146)

Fee for legal services is "certain" if it is payable without regard to outcome of suit; it is "contingent" if obligation to pay depends on particular result's being obtained.

[2] Environmental Law 149E ⇐716

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek711 Costs and Attorney Fees
149Ek716 k. Water pollution. Most Cited Cases
(Formerly 170Ak2737.10)

Enhancement for contingency of attorney fees awarded to prevailing party is not permitted under fee-shifting provisions of Solid Waste Disposal Act and Clean Water Act. Solid Waste Disposal Act, § 7002(e), as amended, 42 U.S.C.A. § 6972(e); Federal Water Pollution Control Act Amendments of 1972, § 505(d), as amended, 33 U.S.C.A. § 1365(d).

****2638** Syllabus [FN*]*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***557** After ruling on the merits for respondents, the District Court determined that they were "substantially prevailing" parties entitled to "reasonable" attorney's fees under the attorney's fee provisions of the Solid Waste Disposal Act and the Clean Water Act. The District Court calculated the fee award by, *inter alia,* enhancing the "lodestar" amount by 25% on the grounds that ****2639** respondents' attorneys were retained on a contingent-fee basis and that without such enhancement respondents would have faced substantial difficulties in obtaining suitable counsel. The Court of Appeals affirmed the fee award.

Held: The fee-shifting statutes at issue do not permit enhancement of a fee award beyond the lodestar amount to reflect the fact that a party's attorneys were retained on a contingent-fee basis. In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (*Delaware Valley II*), this Court addressed, but did not resolve, a question essentially identical to the one presented here. The position taken by the principal opinion in that case, *id.,* at 723-727, 107 S.Ct., at 3085-3088 (opinion of WHITE, J.)-that the typical federal fee-shifting statute does not permit an attorney's fee award to be enhanced on account of contingency-is adopted. The position advocated by *Delaware Valley II* 's concurrence, *id.,* at 731, 733, 107 S.Ct., at 3089, 3090-3091 (O'CONNOR, J., concurring in part and concurring in judgment)-that contingency enhancement is appropriate in defined limited circumstances-is rejected, since it is based upon propositions that are mutually inconsistent as a practical matter; would make enhancement turn upon a circular test for a very large proportion of contingency-fee cases; and could not possibly achieve its supposed goal of mirroring market incentives to attorneys to take cases. Beyond that approach, there is no other basis, fairly derivable from the fee-shifting statutes, by which contingency enhancement, if adopted, could be restricted to fewer than all contingent-fee cases. Moreover, contingency enhancement is not compatible with the fee-shifting statutes at issue, since such enhancement would in effect pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail; is unnecessary to the determination of a reasonable fee and inconsistent with this Court's general rejection of the contingent-fee model in favor of the lodestar model, see, *e.g., Blanchard v. Bergeron,* 489 U.S. 87, 96, 109 S.Ct. 939, 945-946, 103 L.Ed.2d 67; and would make the setting of ***558** fees more complex and arbitrary, hence more unpredictable, and hence more litigable. Pp. 2640-2644.

935 F.2d 1343 (CA2 1991), reversed in part.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, KENNEDY, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which STEVENS, J., joined, *post,* p. 2644. O'CONNOR, J., filed a dissenting opinion, *post,* p. 2648.

----*Michael B. Clapp* argued the cause and filed briefs for petitioner.

Barry L. Goldstein argued the cause for respondents. With him on the brief were *William W. Pearson, Guy T. Saperstein,* and *Mari Mayeda.*

Richard H. Seamon argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Starr, Acting Assistant Attorney General Hartman, Deputy Solicitor General Mahoney, Deputy Assistant Attorney General Clegg, Harriet S. Shapiro, Anne S. Almy,* and *Mark R. Haag.**

* Briefs of *amici curiae* urging reversal were filed for the District of Columbia et al. by *John Payton,* Corporation Counsel for the District of Columbia, *Charles L. Reischel,* Deputy Corporation Counsel, and *Donna M. Murasky,* Assistant Corporation Counsel, and by the Attorneys General for their respective States as follows: *James H. Evans* of Alabama, *Daniel E. Lungren* of California, *Robert A. Butterworth* of Florida, *Roland W. Burris* of Illinois, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *Scott Harshbarger* of Massachusetts, *Frankie Sue Del Papa* of Nevada, *Susan B. Loving* of Oklahoma, *Paul Van Dam* of Utah, and *James E. Doyle* of Wisconsin; and for the Washington Legal Foundation et al. by *David J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the Alabama Employment Lawyers Association et al. by *Sanford Jay Rosen, Andrea G. Asaro, Steven R. Shapiro, John A. Powell, Leon Friedman, Julius L. Chambers, Charles Stephen Ralston,* and *Terisa E. Chaw;* for the American Bar Association

by *Talbot S. D'Alemberte* and *Carter G. Phillips;* and for the Lawyers Committee for Civil Rights Under Law et al. by *Roger E. Warin, Jerald S. Howe, Jr., D. Benson Tesdahl, Herbert M. Wachtell , William H. Brown III, Thomas J. Henderson,* and *Richard T. Seymour.*

***559** Justice SCALIA delivered the opinion of the Court.

This case presents the question whether a court, in determining an award of reasonable attorney's fees under § 7002(e) of the Solid Waste Disposal Act (SWDA), 90 Stat. 2826, as amended, 42 U.S.C. § 6972(e), or § 505(d) of the Federal Water Pollution Control Act (Clean Water Act (CWA)), 86 Stat. 889, as amended, 33 U.S.C. § 1365(d), may enhance the fee award above the "lodestar" amount in order to reflect the fact that the party's attorneys were retained on a contingent-fee basis and thus assumed the risk of receiving no payment at all for their services. Although different fee-shifting statutes are involved, the question is essentially identical to the one we addressed, but did not resolve, in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987) (*Delaware Valley II*).

I

Respondent Ernest Dague, Sr. (whom we will refer to in place of all the respondents), owns land in Vermont adjacent to a landfill ****2640** that was owned and operated by petitioner city of Burlington. Represented by attorneys retained on a contingent-fee basis, he sued Burlington over its operation of the landfill. The District Court ruled, *inter alia,* that Burlington had violated provisions of the SWDA and the CWA, and ordered Burlington to close the landfill by January 1, 1990. It also determined that Dague was a "substantially prevailing party" entitled to an award of attorney's fees under the Acts, see 42 U.S.C. § 6972(e); 33 U.S.C. § 1365(d). 732 F.Supp. 458 (Vt.1989).

In calculating the attorney's fees award, the District Court first found reasonable the figures advanced by Dague for his attorneys' hourly rates and for the number of hours expended by them, producing a resulting "lodestar" attorney's fee of $198,027.50. (What our cases have termed the "lodestar" is "the product of reasonable hours times a reasonable rate," ***560***Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986) (*Delaware Valley I*).) Addressing Dague's request for a contingency enhancement, the court looked to Circuit precedent, which provided that " 'the rationale that should guide the court's discretion is whether "[w]ithout the possibility of a fee enhancement ... competent counsel might refuse to represent [environmental] clients thereby denying them effective access to the courts." ' " App. to Pet. for Cert. 131-132 (quoting *Friends of the Earth v. Eastman Kodak Co.,* 834 F.2d 295, 298 (CA2 1987) , in turn quoting *Lewis v. Coughlin,* 801 F.2d 570, 576 (CA2 1986)). Following this guidance, the court declared that Dague's "risk of not prevailing was substantial" and that "absent an opportunity for enhancement, [Dague] would have faced substantial difficulty in obtaining counsel of reasonable skill and competence in this complicated field of law." It concluded that "a 25% enhancement is appropriate, but anything more would be a windfall to the attorneys." It therefore enhanced the lodestar amount by 25%- $49,506.87. App. to Pet. for Cert. 133, 134.

The Court of Appeals affirmed in all respects. Reviewing the various opinions in *Delaware Valley II,* the court concluded that the issue whether and when a contingency enhancement is warranted remained open, and expressly disagreed with the position taken by some Courts of Appeals that the concurrence in *Delaware Valley II* was controlling. The court stated that the District Court had correctly relied on Circuit precedent, and, holding that the District Court's findings were not clearly erroneous, it upheld the 25% contingency enhancement. 935 F.2d 1343, 1359-1360 (CA2 1991). We granted certiorari only with respect to the propriety of the contingency enhancement. 502 U.S. 1071, 112 S.Ct. 964, 117 L.Ed.2d 130 (1992).

II

[1] We first provide some background to the issue before us. Fees for legal services in litigation may be either "certain" or "contingent" (or some hybrid of the two). A fee is certain ***561** if it is payable without regard to the outcome of the suit; it is contingent if the obligation to pay depends on a particular result's being obtained. Under the most common contingent-fee contract for litigation, the attorney receives no payment for his services if his client loses. Under this arrangement, the attorney bears a contingent risk of nonpayment that is the inverse of the case's prospects of success: if his client has an 80% chance of winning, the attorney's contingent risk is 20%.

In *Delaware Valley II,* we reversed a judgment that had affirmed enhancement of a fee award to reflect the contingent risk of nonpayment. In the process, we addressed whether the typical federal fee-shifting statute (there, § 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d)) permits an attorney's fees award to be enhanced on account of contingency. In the principal opinion, Justice WHITE, joined on this point by three other Justices, determined that such enhancement is not permitted. 483 U.S., at 723-727, 107 S.Ct., at 3085-3088. Justice O'CONNOR, in an opinion concurring in part and concurring in the judgment, concluded that no enhancement****2641** for contingency is appropriate "unless the applicant can establish that without an adjustment for risk the prevailing party would have faced substantial difficulties in finding counsel in the local or other relevant market," *id.,* at 733, 107 S.Ct., at 3091 (internal quotations omitted), and that any enhancement "must be based on the difference in market treatment of contingent fee cases *as a class,* rather than on an assessment of the 'riskiness' of any particular case," *id.,* at 731, 107 S.Ct., at 3089-3090 (emphasis in original). Justice BLACKMUN's dissenting opinion, joined by three other Justices, concluded that enhancement for contingency is always statutorily required. *Id.,* at 737-742, 754, 107 S.Ct., at 3092-3096, 3101.

We turn again to this same issue.

III

Section 7002(e) of the SWDA and § 505(d) of the CWA authorize a court to "award costs of litigation (including *reasonable*562 attorney ... fees*)" to a "prevailing or substantially prevailing party." 42 U.S.C. § 6972(e) (emphasis added); 33 U.S.C. § 1365(d) (emphasis added). This language is similar to that of many other federal fee-shifting statutes, see, *e.g.,* 42 U.S.C. §§ 1988, 2000e-5(k), 7604(d); our case law construing what is a "reasonable" fee applies uniformly to all of them. *Flight Attendants v. Zipes,* 491 U.S. 754, 758, n. 2, 109 S.Ct. 2732, 2735, n. 2, 105 L.Ed.2d 639 (1989).

The "lodestar" figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence. We have established a "strong presumption" that the lodestar represents the "reasonable" fee, *Delaware Valley I, supra,* 478 U.S., at 565, 106 S.Ct., at 3098, and have placed upon the fee applicant who seeks more than that the burden of showing that "such an adjustment is *necessary* to the determination of a reasonable fee." *Blum v. Stenson,* 465 U.S. 886, 898, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984) (emphasis added). The Court of Appeals held, and Dague argues here, that a "reasonable" fee for attorneys who have been retained on a contingency-fee basis must go beyond the lodestar, to compensate for risk of loss and of consequent nonpayment. Fee-shifting statutes should be construed, he contends, to replicate the economic incentives that operate in the private legal market, where attorneys working on a contingency-fee basis can be expected to charge some premium over their ordinary hourly rates. Petitioner Burlington argues, by contrast, that the lodestar fee may not be enhanced for contingency.

We note at the outset that an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar. The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim,

and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar-either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so. ***563***Blum, supra,* at 898-899, 104 S.Ct., at 1548-1549. Taking account of it again through lodestar enhancement amounts to double counting. *Delaware Valley II,* 483 U.S., at 726-727, 107 S.Ct., at 3087-3088 (plurality opinion).

The first factor (relative merits of the claim) is not reflected in the lodestar, but there are good reasons why it should play no part in the calculation of the award. It is, of course, a factor that *always* exists (no claim has a 100% chance of success), so that computation of the lodestar would never end the court's inquiry in contingent-fee cases. See *id.,* at 740, 107 S.Ct., at 3094 (BLACKMUN, J., dissenting). Moreover, the consequence of awarding contingency enhancement to take account of this "merits" factor would be to provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones. Assume, for example,****2642** two claims, one with underlying merit of 20%, the other of 80%. Absent any contingency enhancement, a contingent-fee attorney would prefer to take the latter, since he is four times more likely to be paid. But with a contingency enhancement, this preference will disappear: the enhancement for the 20% claim would be a multiplier of 5 (100/20), which is quadruple the 1.25 multiplier (100/80) that would attach to the 80% claim. Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well. We think that an unlikely objective of the "reasonable fees" provisions. "These statutes were not designed as a form of economic relief to improve the financial lot of lawyers." *Delaware Valley I,* 478 U.S., at 565, 106 S.Ct., at 3098.

Instead of enhancement based upon the contingency risk posed by each case, Dague urges that we adopt the approach set forth in the *Delaware Valley II* concurrence. We decline to do so, first and foremost because we do not see how it can intelligibly be applied. On the one hand, it would require the party seeking contingency enhancement to "establish that without the adjustment for risk [he] 'would have faced ***564** substantial difficulties in finding counsel in the local or other relevant market.' " 483 U.S., at 733, 107 S.Ct., at 3091. On the other hand, it would forbid enhancement based "on an assessment of the 'riskiness' of any particular case." *Id.,* at 731, 107 S.Ct., at 3089-3090; see *id.,* at 734, 107 S.Ct., at 3091 (no enhancement "based on 'legal' risks or risks peculiar to the case"). But since the predominant reason that a contingent-fee claimant has difficulty finding counsel in any legal market where the winner's attorney's fees will be paid by the loser is that attorneys view his case as too risky (*i.e.,* too unlikely to succeed), these two propositions, as a practical matter, collide. See *King v. Palmer,* 292 U.S.App.D.C. 362, 371, 950 F.2d 771, 780 (1991) (en banc), cert. pending *sub nom. King v. Ridley,* No. 91-1370.

A second difficulty with the approach taken by the concurrence in *Delaware Valley II* is that it would base the contingency enhancement on "the difference in market treatment of contingent fee cases *as a class.* " 483 U.S., at 731, 107 S.Ct., at 3089 (emphasis in original). To begin with, for a very large proportion of contingency-fee cases-those seeking not monetary damages but injunctive or other equitable relief-there is no "market treatment." Such cases scarcely exist, except to the extent Congress has created an artificial "market" for them by fee shifting-and looking to *that* " market" for the meaning of fee shifting is obviously circular. Our decrees would follow the "market," which in turn is based on our decrees. See *King v. Palmer,* 285 U.S.App.D.C. 68, 76, 906 F.2d 762, 770 (1990) (Williams, J., concurring) ("I see the judicial judgment as defining the market, not vice versa"), vacated, 292 U.S.App.D.C. 362, 950 F.2d 771 (1991),

cert. pending *sub nom. King v. Ridley,* No. 91-1370. But even apart from that difficulty, any approach that applies uniform treatment to the entire class of contingent-fee cases, or to any conceivable subject-matter-based subclass, cannot possibly achieve the supposed goal of mirroring market incentives. As discussed above, the contingent risk of a case (and hence the difficulty of getting contingent-fee lawyers to take ***565** it) depends principally upon its particular merits. Contingency enhancement calculated on *any* class-wide basis, therefore, guarantees *at best* (leaving aside the double-counting problem described earlier) that those cases within the class that have the class-average chance of success will be compensated according to what the "market" requires to produce the services, and that *all cases* having above-class-average chance of success will be overcompensated.

Looking beyond the *Delaware Valley II* concurrence's approach, we perceive no other basis, fairly derivable from the fee-shifting statutes, by which contingency enhancement, ****2643** if adopted, could be restricted to fewer than all contingent-fee cases. And we see a number of reasons for concluding that no contingency enhancement whatever is compatible with the fee-shifting statutes at issue. First, just as the statutory language limiting fees to prevailing (or substantially prevailing) parties bars a prevailing plaintiff from recovering fees relating to claims on which he lost, *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), so should it bar a prevailing plaintiff from recovering for the risk of loss. See *Delaware Valley II, supra,* 483 U.S., at 719-720, 724-725, 107 S.Ct., at 3083-3084, 3086-3087 (principal opinion). An attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. To award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail.

Second, both before and since *Delaware Valley II,* "we have generally turned away from the contingent-fee model"-which would make the fee award a percentage of the value of the relief awarded in the primary action [FN*]-"to ***566** the lodestar model." *Venegas v. Mitchell,* 495 U.S. 82, 87, 110 S.Ct. 1679, 1682, 109 L.Ed.2d 74 (1990). We have done so, it must be noted, even though the lodestar model often (perhaps, generally) results in a larger fee award than the contingent-fee model. See, *e.g.,* Report of the Federal Courts Study Committee 104 (Apr. 2, 1990) (lodestar method may "give lawyers incentives to run up hours unnecessarily, which can lead to overcompensation"). For example, in *Blanchard v. Bergeron,* 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989), we held that the lodestar governed, even though it produced a fee that substantially exceeded the amount provided in the contingent-fee agreement between plaintiff and his counsel (which was self-evidently an amount adequate to attract the needed legal services). *Id.,* at 96, 109 S.Ct., at 945-946. Contingency enhancement is a feature inherent in the contingent-fee model (since attorneys factor in the particular risks of a case in negotiating their fee and in deciding whether to accept the case). To engraft this feature onto the lodestar model would be to concoct a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it. Contingency enhancement is therefore not consistent with our general rejection of the contingent-fee model for fee awards, nor is it necessary to the determination of a reasonable fee.

> FN* Contrary to Justice BLACKMUN's understanding, *post,* at 2647, there is no reason in theory why the contingent-fee model could not apply to relief other than damages; where injunctive relief is obtained, for example, the fee award would simply be a percentage of the value of the injunctive relief. There would be, to be sure, severe problems of administration in determining the value of injunctive relief, but such problems simply highlight why

> we have rejected the contingent-fee model in favor of the lodestar model.

And finally, the interest in ready administrability that has underlain our adoption of the lodestar approach, see, *e.g., Hensley,* 461 U.S., at 433, 103 S.Ct., at 1939, and the related interest in avoiding burdensome satellite litigation (the fee application "should not result in a second major litigation," *id.,* at 437, 103 S.Ct., at 1941), counsel strongly against adoption of contingency enhancement. Contingency enhancement would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable. It is neither necessary nor even possible for application of the fee-shifting statutes to mimic the intricacies***567** of the fee-paying market in every respect. See *Delaware Valley I,* 478 U.S., at 565, 106 S.Ct., at 3098.

* * *

[2] Adopting the position set forth in Justice WHITE's opinion in *Delaware Valley II,* 483 U.S., at 715-727, 107 S.Ct., at 3081-3088, we hold that enhancement for contingency is not permitted under the fee-shifting statutes ****2644** at issue. We reverse the Court of Appeals' judgment insofar as it affirmed the 25% enhancement of the lodestar.

It is so ordered.

Justice BLACKMUN, with whom Justice STEVENS joins, dissenting.

In language typical of most federal fee-shifting provisions, the statutes involved in this case authorize courts to award the prevailing party a "reasonable" attorney's fee.[FN1] Two principles, in my view, require the conclusion that the "enhanced" fee awarded to respondents was reasonable. First, this Court consistently has recognized that a "reasonable" fee is to be a "fully compensatory fee," *Hensley v. Eckerhart,* 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983), and is to be "calculated on the basis of rates and practices prevailing in the relevant market." *Missouri v. Jenkins,* 491 U.S. 274, 286, 109 S.Ct. 2463, 2470, 105 L.Ed.2d 229 (1989). Second, it is a fact of the market that an attorney who is paid only when his client prevails will tend to charge a higher fee than one who is paid regardless of outcome,[FN2] and relevant professional standards long have recognized that this practice is reasonable.[FN3]

> FN1. See 33 U.S.C. § 1365(d) (Clean Water Act); 42 U.S.C. § 6972(e) (Solid Waste Disposal Act).
>
> FN2. See, *e.g.,* R. Posner, Economic Analysis of Law § 21.9, pp. 534-535 (3d ed. 1986).
>
> FN3. See Canons of Ethics § 12, 33 A.B.A.Rep. 575, 578 (1908); Model Code of Professional Responsibility, DR 2-106(B)(8) (1980); ABA Model Rules of Professional Conduct Rule 1.5(a)(8) (1992).

***568** The Court does not deny these principles. It simply refuses to draw the conclusion that follows ineluctably: If a statutory fee consistent with market practices is "reasonable," and if in the private market an attorney who assumes the risk of nonpayment can expect additional compensation, then it follows that a statutory fee may include additional compensation for contingency and still qualify as reasonable. The Court's decision to the contrary violates the principles we have applied consistently in prior cases and will seriously weaken the enforcement of those statutes for which Congress has authorized fee awards-notably, many of our Nation's civil rights laws and environmental laws.

I

Congress' purpose in adopting fee-shifting provisions was to strengthen the enforcement of selected federal laws by ensuring that private persons seeking to enforce those laws could retain competent counsel. See S.Rep. No. 94-1011, p. 6 (1976), U.S.Code Cong. & Admin.News 1976, p. 5908. In particular, federal fee-shifting provisions have been

designed to address two related difficulties that otherwise would prevent private persons from obtaining counsel. First, many potential plaintiffs lack sufficient resources to hire attorneys. See H.R.Rep. No. 94-1558, p. 1 (1976); S.Rep. No. 94-1011, at 2. Second, many of the statutes to which Congress attached fee-shifting provisions typically will generate either no damages or only small recoveries; accordingly, plaintiffs bringing cases under these statutes cannot offer attorneys a share of a recovery sufficient to justify a standard contingent-fee arrangement. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II),* 483 U.S. 711, 749, 107 S.Ct. 3078, 3099, 97 L.Ed.2d 585 (1987) (dissenting opinion); H.R.Rep. No. 94-1558 at 9. The strategy of the fee-shifting provisions is to attract competent counsel to selected federal cases by ensuring that if they prevail, counsel will receive fees commensurable with what they could obtain in other litigation. If federal fee-bearing ***569** litigation is less remunerative than private litigation, then the only attorneys who will take such cases will be underemployed lawyers-who likely will be less competent than the successful, busy lawyers who would shun federal fee-bearing litigation-and public interest lawyers who, by any measure, are insufficiently numerous to ****2645** handle all the cases for which other competent attorneys cannot be found. See *Delaware Valley II,* 483 U.S., at 742-743, 107 S.Ct., at 3095-3096 (dissenting opinion).

In many cases brought under federal statutes that authorize fee shifting, plaintiffs will be unable to ensure that their attorneys will be compensated for the risk that they might not prevail. This will be true in precisely those situations targeted by the fee-shifting statutes-where plaintiffs lack sufficient funds to hire an attorney on a win-or-lose basis and where potential damages awards are insufficient to justify a standard contingent-fee arrangement. In these situations, unless the fee-shifting statutes are construed to compensate attorneys for the risk of nonpayment associated with loss, the expected return from cases brought under federal fee-shifting provisions will be less than could be obtained in otherwise comparable private litigation offering guaranteed, win-or-lose compensation. Prudent counsel, under these conditions, would tend to avoid federal fee-bearing claims in favor of private litigation, even in the very situations for which the attorney's fee statutes were designed. This will be true even if the fee-bearing claim is more likely meritorious than the competing private claim.

In *Delaware Valley II,* five Justices of this Court concluded that for these reasons the broad statutory term "reasonable attorney's fee" must be construed to permit, in some circumstances, compensation above the hourly win-or-lose rate generally borrowed to compute the lodestar fee. See 483 U.S., at 731, 732-733, 107 S.Ct., at 3089, 3090-3091 (O'CONNOR, J., concurring in part and concurring in judgment); *id.,* at 735, 107 S.Ct., at 3091-3092 (dissenting opinion). Together with the three Justices who joined my dissenting opinion in that case, I would have allowed enhancement ***570** where, and to the extent that, the attorney's compensation is contingent upon prevailing and receiving a statutory award. I indicated that if, by contrast, the attorney and client have been able to mitigate the risk of nonpayment-either in full, by agreeing to win-or-lose compensation or to a contingent share of a substantial damage recovery, or in part, by arranging for partial payment-then to that extent enhancement should be unavailable. *Id.,* at 748-749, 107 S.Ct., at 3098-3099. I made clear that the "risk" for which enhancement might be available is not the particular factual and legal riskiness of an individual case, but the risk of nonpayment associated with contingent cases considered as a class. *Id.,* at 745-747, 752, 107 S.Ct., at 3097-3098, 3100. Congress, I concluded, did not intend to prohibit district courts from considering contingency in calculating a "reasonable" attorney's fee.[FN4]

> FN4. A number of bills introduced in Congress would have done just this, by prohibiting "bonuses and multipliers" where a

> suit is against the United States, a State, or a local government. These bills failed to receive congressional approval. See *Delaware Valley II,* 483 U.S., at 739, n. 3, 107 S.Ct., at 3094, n. 3 (dissenting opin- ion).
>
> Moreover, in some instances Congress explicitly has prohibited enhancements, as in the 1986 amendments to the Education of the Handicapped Act. See 20 U.S.C. § 1415(e)(4)(C) ("[n]o bonus or multiplier may be used in calculating the fees awarded under this subsection"). Congress' express prohibition on enhancement in this statute suggests that it did not understand the standard fee-shifting language used elsewhere to bar enhancement. Cf. *West Virginia Univ. Hospitals, Inc. v. Casey,* 499 U.S. 83, 92-97, 111 S.Ct. 1138, 1143-1146, 113 L.Ed.2d 68 (1991) (relying, in part, on express authorization of expert-witness fees in subsequently passed fee-shifting statutes to infer that such fees could not have been included in unsupplemented references to "attorney's fees").

Justice O'CONNOR's concurring opinion agreed that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee," *id.,* at 731, 107 S.Ct., at 3089, and that "compensation for contingency must be based on the difference in market treatment of contingent-fee cases *as a class,* rather than on an assessment of the 'riskiness'**2646 of any particular case" (emphasis in original). *Ibid.* As I understand her opinion, *571 Justice O'CONNOR further agreed that a court considering an enhancement must determine whether and to what extent the attorney's compensation was contingent, as well as whether and to what extent that contingency was, or could have been, mitigated. Her concurrence added, however, an additional inquiry designed to make the market-based approach "not merely justifiable in theory but also objective and nonarbitrary in practice." *Id.,* at 732, 107 S.Ct., at 3090. She suggested two additional "constraints on a court's discretion" in determining whether, and how much, enhancement is warranted. First, "district courts and courts of appeals should treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market," and varying rates of enhancement among markets must be justifiable by reference to real differences in those markets. *Id.,* at 733, 107 S.Ct., at 3090. Second, the applicant bears the burden of demonstrating that without an adjustment for risk "the prevailing party would have faced substantial difficulties in finding counsel in the local or other relevant market." *Ibid.* (internal quotation marks omitted).

II

After criticizing at some length an approach it admits respondents and their *amici* do not advocate, see *ante,* at 2641-2642, and after rejecting the approach of the *Delaware Valley II* concurrence, see *ante,* at 2642-2643, the Court states that it "see[s] a number of reasons for concluding that no contingency enhancement whatever is compatible with the fee-shifting statutes at issue." *Ante,* at 2643. I do not find any of these arguments persuasive.

The Court argues, first, that "[a]n attorney operating on a contingency-fee basis pools the risks presented by his various cases" and uses the cases that were successful to subsidize those that were not. *Ibid.* "To award a contingency enhancement under a fee-shifting statute," the Court concludes, would "in effect" contravene the prevailing-party *572 limitation, by allowing the attorney to recover fees for cases in which his client does not prevail. *Ibid.* What the words "in effect" conceal, however, is the Court's inattention to the language of the statutes: The provisions at issue in this case, like fee-shifting provisions generally, authorize fee awards to prevailing *parties,* not their attorneys. See 33 U.S.C. § 1365(d); 42 U.S.C. § 6972(e); see also *Venegas v. Mitchell,* 495 U.S. 82, 87, 110 S.Ct. 1679, 1682, 109 L.Ed.2d 74 (1990). Respondents

simply do not advocate awarding fees to any party who has not prevailed. Moreover, the Court's reliance on the "prevailing party" li mitation is somewhat misleading: the Court's real objection to contingency enhancement is that the *amount* of an enhanced award would be excessive, not that parties receiving enhanced fee awards are not prevailing parties *entitled* to an award. In prior cases the Court has been careful to distinguish between these two issues. See, *e.g., Hensley v. Eckerhart,* 461 U.S., at 433, 103 S.Ct., at 1939 (The "prevailing party" determination only "brings the plaintiff ... across the statutory threshold. It remains for the district court to determine what fee is 'reasonable' ").

Second, the Court suggests that "both before and since *Delaware Valley II,* ' we have generally turned away from the contingent-fee model'-which would make the fee award a percentage of the value of the relief awarded in the primary action-'to the lodestar model.' " *Ante,* at 2643 (footnote omitted), quoting *Venegas v. Mitchell,* 495 U.S., at 87, 110 S.Ct., at 1682. This argument simply plays on two meanings of "contingency." Most assuredly, respondents-who received no damages for their fee-bearing claims-do not advocate "mak[ing] the fee award a percentage" of that amount. Rather, they argue that the *lodestar* figure must be enhanced because their attorneys' compensation was ****2647** contingent on prevailing, and because their attorneys could not otherwise be compensated for assuming the risk of nonpayment.

Third, the Court suggests that allowing for contingency enhancement "would make the setting of fees more complex ***573** and arbitrary" and would likely lead to "burdensome satellite litigation" that this Court has said should be avoided. *Ante,* at 2643. The present case is an odd one in which to make this point: The issue of enhancement hardly occupied center stage in the fees portion of this litigation, and it became a time-consuming matter only after the Court granted certiorari, limited to this question alone.[FN5] Moreover, if Justice O'CONNOR's standard were adopted, the matter of the amount by which fees should be increased would quickly become settled in the various district courts and courts of appeals for the different kinds of federal litigation. And in any event, speculation that enhancement determinations would be "burdensome" does not speak to the issue whether they are required by the fee-shifting statutes.

> FN5. It is fair to say that petitioner's attention was directed almost exclusively toward the merits issues, both in the lower courts and in its petition for certiorari. While petitioner sharply contested respondents' entitlement to an award and objected to the amount of the lodestar, its opposition to enhancement occupies only a single page of its memorandum in opposition to the motion for fees and costs. See App. 224-225. Only a little more than 1 page of the 30-page petition for certiorari is devoted to the issue of contingency enhancement. See Pet. for Cert. 25-27.

The final objection to be considered is the Court's contention that any approach that treats contingent-fee cases as a class is doomed to failure. The Court's argument on this score has two parts. First, the Court opines that "for a very large proportion of contingency-fee cases"-cases in which only equitable relief is sought-"there is no 'market treatment,' " except insofar as Congress has created an "artificial" market with the fee-shifting statutes themselves. It is circular, the Court contends, to "loo[k] to *that* 'market' for the meaning of fee-shifting." *Ante,* at 2642. And even leaving that difficulty aside, the Court continues, the real "risk" to which lawyers respond is the riskiness of particular cases. Because under a class-based contingency enhancement system the same enhancement will be awarded whether the ***574** chance of prevailing was 80% or 20%, " *all cases* having above-class-average chance of success will be overcompensated" (emphasis in original). *Ante,* at 2642.

Both parts of this argument are mistaken. The circularity objection overlooks the fact that even

under the Court's unenhanced lodestar approach, the district court must find a relevant private market from which to select a fee. The Court offers no reason why this market disappears only when the inquiry turns to enhancement. The second part of the Court's argument is mistaken so far as it assumes the only relevant incentive to which attorneys respond is the risk of losing particular cases. As explained above, a proper system of contingency enhancement addresses a different kind of incentive: the common incentive of all lawyers to avoid *any* fee-bearing claim in which the plaintiff cannot guarantee the lawyer's compensation if he does not prevail. Because, as the Court observes, "no claim has a 100% chance of success," *ante,* at 2641, *any* such case under a pure lodestar system will offer a lower prospective return per hour than one in which the lawyer will be paid at the same lodestar rate, win or lose. Even the *least* meritorious case in which the attorney is guaranteed compensation whether he wins or loses will be economically preferable to the *most* meritorious fee-bearing claim in which the attorney will be paid only if he prevails, so long as the cases require the same amount of time. Yet as noted above, this latter kind of case-in which potential plaintiffs can neither afford to hire attorneys on a straight hourly basis nor offer a percentage of a substantial damages recovery-is exactly the kind of case for which the fee-shifting statutes were designed.

****2648** III

Preventing attorneys who bring actions under fee-shifting statutes from receiving fully compensatory fees will harm far more than the legal profession. Congress intended the fee-shifting statutes to serve as an integral enforcement ***575** mechanism in a variety of federal statutes-most notably, civil rights and environmental statutes. The *amicus* briefs filed in this case make clear that we can expect many meritorious actions will not be filed, or, if filed, will be prosecuted by less experienced and able counsel. [FN6] Today's decision weakens the protections we afford important federal rights.

FN6. See Brief for Lawyers' Committee for Civil Rights Under Law et al. as *Amici Curiae* 16-22; Brief for Alabama Employment Lawyers Association et al. as *Amici Curiae* 12-13.

I dissent.

Justice O'CONNOR, dissenting.

I continue to be of the view that in certain circumstances a "reasonable" attorney's fee should not be computed by the purely retrospective lodestar figure, but also must incorporate a reasonable incentive to an attorney contemplating whether or not to take a case in the first place. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 731-734, 107 S.Ct. 3078, 3089-3091, 97 L.Ed.2d 585 (1987) (*Delaware Valley II*) (O'CONNOR, J., concurring in part and concurring in judgment). As Justice BLACKMUN cogently explains, when an attorney must choose between two cases-one with a client who will pay the attorney's fees win or lose and the other who can only promise the statutory compensation if the case is successful-the attorney will choose the fee-paying client, unless the contingency client can promise an enhancement of sufficient magnitude to justify the extra risk of nonpayment. *Ante,* at 2644-2645. Thus, a reasonable fee should be one that would "attract competent counsel," *Delaware Valley II, supra,* at 733, 107 S.Ct., at 3091 (O'CONNOR, J., concurring in part and concurring in judgment), and in some markets this must include the assurance of a contingency enhancement if the plaintiff should prevail. I therefore dissent from the Court's holding that a "reasonable" attorney's fee can never include an enhancement for cases taken on contingency.

***576** In my view the promised enhancement should be "based on the difference in market treatment of contingent fee cases as a class, rather than on an assessment of the 'riskiness' of any particular case." 483 U.S., at 731, 107 S.Ct., at 3089 (emphasis omitted). As Justice BLACKMUN has shown, the Court's reasons for rejecting a market-based approach do not stand up to scrutiny. *Ante,* at

2643. Admittedly, the courts called upon to determine the enhancements appropriate for various markets would be required to make economic calculations based on less-than-perfect data. Yet that is also the case, for example, in inverse condemnation and antitrust cases, and the Court has never suggested that the difficulty of the task or possible inexactitude of the result justifies forgoing those calculations altogether. As Justice BLACKMUN notes, these initial hurdles would be overcome as the enhancements appropriate to various markets became settled in the district courts and courts of appeals. *Ante,* at 2642.

In this case, the District Court determined that a 25% contingency enhancement was appropriate by reliance on the likelihood of success in the individual case. App. to Pet. for Cert. 132-133. The Court of Appeals affirmed on the basis of its holding in *Friends of the Earth v. Eastman Kodak Co.,* 834 F.2d 295 (CA2 1987), which asks simply whether, without the possibility of a fee enhancement, the prevailing party would not have been able to obtain competent counsel. 935 F.2d 1343, 1360 (CA2 1991) (citing *Friends of the Earth, supra*). Although I ****2649** believe that inquiry is part of the contingency enhancement determination, see *Delaware Valley II, supra,* at 733, 107 S.Ct., at 3089. (O'CONNOR, J., concurring in part and concurring in judgment), I also believe that it was error to base the degree of enhancement on case-specific factors. Because I can find no market-specific support for the 25% enhancement figure in the affidavits submitted by respondents in support of the fee request, I would vacate the judgment affirming the fee award and remand for a market-based assessment of a suitable enhancement for contingency.

U.S.Vt.,1992.
City of Burlington v. Dague
505 U.S. 557, 112 S.Ct. 2638, 60 Fair Empl.Prac.Cas. (BNA) 11, 34 ERC 1857, 120 L.Ed.2d 449, 60 USLW 4717, 22 Envtl. L. Rep. 21,099

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606 F.3d 1216, 2010 Copr.L.Dec. P 29,931, 94 U.S.P.Q.2d 1950, 10 Cal. Daily Op. Serv. 7027, 2010 Daily Journal D.A.R. 8330
(Cite as: 606 F.3d 1216)

H

United States Court of Appeals,
Ninth Circuit.
Bappi LAHIRI, an individual; Saregama India Limited, Plaintiffs,
Anthony Kornarens, Esquire, Movant-Appellant,
v.
UNIVERSAL MUSIC AND VIDEO DISTRIBUTION CORPORATION, a Delaware corporation; Interscope Records, a corporation; Aftermath Records, a business entity form unknown; Andre Ramelle Young, Defendants-Appellees.

No. 09-55111.
Argued and Submitted April 9, 2010.
Filed June 7, 2010.

Background: Composer brought copyright infringement action against music company. The United States District Court for the Central District of California, Otis D. Wright II, J., 513 F.Supp.2d 1172, granted music company summary judgment, and the District Court then sanctioned composer's attorney for his five-year pursuit of frivolous action. Attorney appealed.

Holdings: The Court of Appeals, Conlon, J., held that:
(1) District Court did not abuse its discretion by sanctioning composer's attorney for knowingly and recklessly pursuing frivolous action and litigating it in bad faith for five years, and
(2) District Court did not abuse its discretion in imposing monetary sanction against composer's attorney in amount of $258,206.04 in attorney fees and costs.

Affirmed.

West Headnotes

[1] Federal Courts 170B ⚿813

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk813 k. Allowance of remedy and matters of procedure in general. Most Cited Cases

A district court's imposition of sanctions is reviewed by the Court of Appeals for abuse of discretion, and its findings of fact are reviewed for clear error.

[2] Federal Civil Procedure 170A ⚿2757

170A Federal Civil Procedure
170AXX Sanctions
170AXX(A) In General
170Ak2756 Authority to Impose
170Ak2757 k. Inherent authority. Most Cited Cases

Federal Civil Procedure 170A ⚿2766

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2766 k. Multiplication of proceedings in general. Most Cited Cases

Federal Civil Procedure 170A ⚿2769

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2769 k. Reasonableness or bad faith in general; objective or subjective standard. Most Cited Cases

A court's finding of recklessness suffices for imposition of statutory sanctions due to attorney's unreasonable and vexatious multiplication of proceedings, but sanctions imposed under the district court's inherent authority require a bad faith finding. 28 U.S.C.A. § 1927.

[3] Federal Civil Procedure 170A ⚿2771(8)

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2771 Complaints, Counterclaims and Petitions
170Ak2771(8) k. Intellectual property cases. Most Cited Cases

Federal Civil Procedure 170A ⚿2800

170A Federal Civil Procedure
170AXX Sanctions
170AXX(C) Persons Liable for or Entitled to Sanctions
170Ak2800 k. In general. Most Cited Cases

District Court did not abuse its discretion by sanctioning composer's attorney for knowingly and recklessly pursuing frivolous copyright infringement claim against music company, and litigating claim in bad faith for five years; under Indian law which governed copyright, composer had no copyright interest in music he composed for hire which attorney would have known had he conducted cursory investigation into circumstances of composition, attorney made repeated misrepresentations of Indian copyright law, attorney's amended complaint asserted contrived United States copyright claim, created by registration of 21-year-old composition, after composer's Lanham Act and unfair composition claims were placed in jeopardy by Supreme Court's grant of certiorari to decide scope of Lanham Act false designation claims, attorney attempted to cause district court judge's recusal by retaining judge's law firm to defend attorney against sanctions motion while decision on motion was impending, and attorney misled district court by use of settlement agreement between composer and assignee of copyright that deceptively used ownership language, but did not convey or recognize co-ownership of music. Lanham Act, § 1 et seq., 15 U.S.C.A. § 1051 et seq.; 28 U.S.C.A. § 1927.

[4] Federal Civil Procedure 170A ⚿928

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(I) Motions in General
170Ak928 k. Determination. Most Cited Cases

A court may revisit prior decisions in a case and correct errors while the case is still pending.

[5] Federal Civil Procedure 170A ⚿2771(8)

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2771 Complaints, Counterclaims and Petitions
170Ak2771(8) k. Intellectual property cases. Most Cited Cases

Federal Civil Procedure 170A ⚿2816

170A Federal Civil Procedure
170AXX Sanctions
170AXX(D) Type and Amount
170Ak2811 Monetary Sanctions
170Ak2816 k. Multiplication of proceedings. Most Cited Cases

District Court did not abuse its discretion in imposing monetary sanction against composer's attorney in amount of $258,206.04 in attorney fees and costs for knowingly and recklessly pursuing frivolous copyright infringement claim against music company; court reduced music company's claimed $894,539.44 in attorney fees and costs, as award was explicitly limited to excess costs and fees incurred in defending against composer's copyright infringement claim and excluded litigation expenses for composer's dismissed Lanham Act and unfair competition claims, court used traditional lodestar analysis of music company's contemporaneous billing records and apportioned half of billings to composer, attorney initiated most of litigation activity resulting in music company's excessive fees and costs, court identified attorneys and paralegals primarily responsible for block billing and reduced

80% of their billable hours by 30%, and in reducing music company's recovery of costs, court carefully excluded inadequately documented costs as well as taxable costs not included in company's bill of costs. Lanham Act, § 1 et seq., 15 U.S.C.A. § 1051 et seq.; 28 U.S.C.A. § 1927.

***1218** Curtis A. Cole, Matthew Levinson, Cole Pedroza, LLP, Pasadena, CA, for the movant-appellant.

Russell J. Frackman, Mitchell Silberberg & Knupp, LLP, Los Angeles, CA, Jeffrey D. Goldman, Loeb & Loeb, LLP, Los Angeles, CA, for the defendants-appellees.

Appeal from the United States District Court for the Central District of California, Otis D. Wright II, District Judge, Presiding. D.C. No. 2:02-cv-08330-ODW-CT.

Before HARRY PREGERSON and ROBERT R. BEEZER, Circuit Judges, and SUZANNE B. CONLON,[FN*] District Judge.

FN* The Honorable Suzanne B. Conlon, United States District Judge for the Northern District of Illinois, sitting by designation.

CONLON, District Judge:

Anthony Kornarens is an attorney specializing in copyright law. Kornarens was severely sanctioned by the district court for his five-year bad faith pursuit of a frivolous copyright infringement claim. In its 21-page order, the district court awarded defendants $247,397.28 in attorneys' fees and $10,808.76 in costs, under 28 U.S.C. § 1927 [FN1] and the court's inherent sanctioning power. Kornarens appeals, contending the sanctions were unwarranted and excessive.[FN2] We disagree and affirm.

FN1. 28 U.S.C. § 1927 provides that an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

FN2. Kornarens' client, plaintiff Bappi Lahiri, appealed the district court's summary judgment order in defendants' favor (*Lahiri v. Universal Music & Video Distrib., Inc.,* 513 F.Supp.2d 1172 (C.D.Cal.2007)), but voluntarily dismissed the appeal.

I

[1][2] We have jurisdiction under 28 U.S.C. § 1291. A district court's imposition of sanctions is reviewed for abuse of discretion, and its findings of fact for clear error. *Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.,* 210 F.3d 1112, 1117 (9th Cir.2000). An attorney who unreasonably and vexatiously "multiplies the ***1219** proceedings" may be required to pay the excess fees and costs caused by his conduct. 28 U.S.C. § 1927. Recklessness suffices for § 1927 sanctions, but sanctions imposed under the district court's inherent authority require a bad faith finding. *See B.K.B. v. Maui Police Dep't,* 276 F.3d 1091, 1107-08 (9th Cir.2002) (attorney's knowing and reckless introduction of inadmissible evidence was tantamount to bad faith and warranted sanctions under § 1927 and the court's inherent power); *Fink v. Gomez,* 239 F.3d 989, 993-94 (9th Cir.2001) (attorney's reckless misstatements of law and fact, combined with an improper purpose, are sanctionable under the court's inherent power).

The parties dispute whether a bad faith finding must be supported by clear and convincing evidence. This court has not addressed the burden of proof required for a sanctions award. *See, e.g., In re Lehtinen,* 564 F.3d 1052, 1061 n. 4 (9th Cir.2009) (declining to address burden because clear and convincing evidence of misconduct supported bad faith finding and imposition of sanctions under the court's inherent authority); *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.,* 244 F.3d 1128,

1143 n. 11 (9th Cir.2001) (same). The burden of proof issue need not be resolved here because the district court's bad faith finding is supported by clear and convincing evidence.

II

Kornarens represented Bappi Lahiri, who in 1981 composed the song *Thoda* for an Indian movie. Lahiri composed *Thoda* for compensation under an agreement with the film's producer, Pramod Films. The parties agreed the law of India controls the underlying copyright issues. Under Indian law, Pramod Films, not Lahiri, owned the *Thoda* copyright as a work for hire. Pramod Films later assigned its *Thoda* rights to Saregama India Limited ("Saregama").

Twenty-one years later, Kornarens filed suit on Lahiri's behalf, claiming defendants Universal Music & Video Distribution Corporation, Interscope Records, Aftermath Records and Andre Ramelle Young ("defendants") used unauthorized excerpts of *Thoda* in violation of the Lanham Act, 15 U.S.C. § 1125(a), and engaged in unfair competition under parallel California law for failure to credit Lahiri's authorship. Kornarens, a copyright specialist, did not include a copyright infringement claim in the original complaint.

Three months later the Supreme Court granted *certiorari* in *Dastar Corp. v. Twentieth Century Fox Film Corp.,* 537 U.S. 1099, 123 S.Ct. 816, 154 L.Ed.2d 767 (2003). The central issue in *Dastar* was whether Lanham Act false designation claims were limited to producers of tangible goods, and excluded Lanham Act protection for authors of ideas, concepts or communications embodied in the goods. An adverse decision by the Supreme Court would clearly jeopardize Lahiri's Lanham Act and parallel unfair competition claims.

Three months after the Supreme Court granted *certiorari* in *Dastar,* Lahiri registered a copyright in *Thoda* with the United States Copyright Office. On June 2, 2003, the Supreme Court issued its opinion limiting Lanham Act false designation claims to producers of tangible goods. *Dastar Corp. v. Twentieth Century Fox Film Corp.,* 539 U.S. 23, 37, 123 S.Ct. 2041, 156 L.Ed.2d 18 (2003). Three weeks later, Kornarens amended Lahiri's complaint to add a *Thoda* copyright infringement claim under the United States copyright issued a few months earlier. This became Lahiri's sole claim on August 15, 2003, when the district court dismissed his Lanham Act and parallel unfair competition claims under *Dastar.*

Meanwhile, based on Pramod Films' assignment of the *Thoda* copyright, Saregama*1220 sued defendants for infringement. Lahiri and Saregama's lawsuits, asserting conflicting claims of a *Thoda* copyright, ultimately were consolidated before the United States District Court for the Central District of California. Defendants moved to stay the consolidated cases and proposed to submit the competing copyright ownership claims by Lahiri and Saregama to an Indian court for resolution. Alternatively, defendants moved for summary judgment against Lahiri on the ground that he did not own a valid copyright in *Thoda;* defendants argued that Saregama owned the copyright under Indian law. Lahiri and Saregama filed cross-motions for summary judgment on their conflicting claims to ownership of a *Thoda* copyright.

After the district court requested supplemental briefing on whether the consolidated cases should be stayed, Kornarens submitted an agreement that he mischaracterized as resolving the issue of copyright ownership between Lahiri and Saregama, purporting to moot the need for a stay and the cross-motions for summary judgment between Lahiri and Saregama. The district court credited Kornarens' characterization of the agreement as resolving conflicting copyright ownership claims. Contrary to Kornarens' representations, Lahiri and Saregama agreed to a 30/70% (respectively) split of any copyright infringement recovery from defendants, and the agreement explicitly referred to co-ownership of the *Thoda* copyright only for purposes of these consolidated cases. Relying on the purported co-

ownership settlement agreement, the district court erroneously concluded Lahiri was the co-owner of the *Thoda* copyright. This error resulted in the denial of defendants' summary judgment motion against Lahiri predicated on the meritorious contention Lahiri lacked a copyright interest in *Thoda.* Defendants' argument that Saregama owned the *Thoda* copyright under Indian law was rejected by the district court without analysis. Contentious litigation ensued for three more years, resulting in an additional 233 docket entries and three rounds of trial preparation.

On August 9, 2007, the district court granted defendants' renewed summary judgment motion against Lahiri. After a thorough analysis, the district court concluded Lahiri did not have a copyright interest in *Thoda* under Indian law. *Lahiri v. Universal Music & Video Distrib., Inc.,* 513 F.Supp.2d 1172 (C.D.Cal.2007).[FN3] Defendants then moved for $800,752.00 in attorneys' fees and $93,787.44 in costs under § 1927 and the court's inherent authority to sanction attorney misconduct. The sanctions issues were fully briefed and the district court held a hearing before issuing its detailed 21-page order granting defendants' motion, but substantially reducing the award defendants sought.

FN3. After summary judgment was entered against Lahiri, defendants quickly settled with Saregama.

III

[3] Kornarens argues the district court abused its discretion by sanctioning him for knowingly and recklessly pursuing a frivolous copyright infringement claim and litigating that claim in bad faith. The record supports the district court's findings and imposition of sanctions. The parties agreed that resolution of *Thoda's* ownership is governed by the Indian Copyright Act, 1957, and the Indian Supreme Court's interpretation of the act in *Indian Performing Right So c'y Ltd. v. E. Indian M otion Pict ures Ass'n and Others* (" *IPRS* "), A.I.R.1977 S.C. 1443. Unequivocally, the law of India ***1221** vests a copyright in a movie score composed for compensation in the film company; the composer has no copyright interest absent an agreement to the contrary. Had Kornarens, a self-described experienced copyright lawyer, made even a cursory investigation into the circumstances of Lahiri's 21-year old composition of *Thoda,* he would have known Lahiri had no copyright interest in music he composed for hire.

On appeal, Kornarens argues he reasonably relied on an expert in Indian law, as well as his unsupported assertion that Lahiri represented he owned the *Thoda* copyright. The district court did not abuse its discretion in rejecting similar arguments. The law of India is straightforward and the *IPRS* decision is in English. Indeed, there is nothing legally remarkable or unique about applicable Indian law that would reasonably require expert advice. Generally, a composer who creates a film score for hire forfeits a copyright interest in his work. *See, e.g.,* 17 U.S.C § 101 (a work made for hire includes a work specially ordered or commissioned for use as part of a motion picture if the parties expressly agree in a signed, written instrument that the work shall be considered a work made for hire), § 201(b) (the employer or other person for whom the work made for hire was prepared owns the copyright unless the parties expressly agree otherwise in a signed, written instrument); *Warren v. Fox Family Worldwide, Inc.,* 328 F.3d 1136, 1140-43 (9th Cir.2003) (composer of television series music for hire did not own copyright in the music).

Kornarens attempted to justify his untenable interpretation of Indian copyright law by misrepresenting the *IPRS* decision: he cited the immaterial concurring opinion as the Indian Supreme Court's holding. He repeatedly misquoted *Gee Pee Films, Pvt. Ltd. v. Pratik Chowdhury and Others,* G.A. No. 2756 of 2001 and C.S. No. 356 of 2001, for the proposition that a film producer does not have a copyright interest in songs that it commissions. *Gee Pee* expressly involved *non-film* music. Kornarens inserted the parenthetical "(film company)" into a quotation from *Gee Pee* to support his misrepres-

entation the case involved Indian film music. The district court did not abuse its discretion in concluding Kornarens' misrepresentations of Indian law evidenced his bad faith and recklessness in pursuing Lahiri's copyright claim.

Kornarens now concedes his written submissions to the district court contained "mistakes." However, viewed in the context of the history of this litigation, the court did not abuse its discretion in finding that Kornarens acted recklessly and in bad faith in pursuing a frivolous copyright claim for five years. Kornarens' amended complaint asserted a contrived United States copyright claim created by registration of a 21-year old composition after his Lanham Act and unfair competition claims were placed in jeopardy by the Supreme Court's grant of *certiorari* in *Dastar*. Lahiri composed *Thoda* for a film produced in India, under an agreement with an Indian film producer for financial compensation. Pursuit of a copyright claim without inquiring whether Lahiri composed *Thoda* for hire would be reckless under the laws of either India or the United States. The district court did not err in its factual findings or abuse its discretion in concluding that Kornarens' repeated misrepresentations of Indian copyright law clearly evidenced his recklessness and bad faith.

After the sanctions motion was filed and the district court's decision was impending, Kornarens attempted to cause the judge's recusal by retaining the judge's former law firm to defend him against the sanctions motion. The district court's consideration of this manipulative tactic as evidence of bad faith was not an abuse of discretion. ***1222** The district court reasonably inferred that Kornarens' intent was to have the case assigned to a new judge who would be unfamiliar with the protracted history of this litigation. [FN4]

> FN4. Over the five-year history of this litigation, three different judges of the United States District Court for the Central District of California were assigned to this case.

[4] Kornarens contends the initial denial of summary judgment precludes imposition of sanctions because the decision "placed [the district court's] imprimatur of propriety" on Lahiri's copyright claim. The record strongly suggests otherwise. The summary judgment denial was predicated on Kornarens' misleading submission of the Lahiri-Saregama settlement as purportedly recognizing Lahiri as the co-owner of the copyright; the agreement only applied "ownership" to a split of an anticipated recovery in this litigation. The record demonstrates Kornarens misled the district court by use of a settlement agreement that deceptively used ownership language, but did not convey or recognize co-ownership of *Thoda*. In any case, a court may revisit prior decisions in a case and correct errors while the case is still pending. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988). Similarly, Kornarens' argument that he acted in good faith reliance on the settlement agreement in his continued pursuit of Lahiri's copyright claim is frivolous, given the restrictive language of a document Kornarens himself submitted to the district court.

Kornarens argues that no single instance of misconduct cited by the district court justified the imposition of sanctions. Kornarens ignores the record. The district court's bad faith finding was based on the cumulative effect of his litigation conduct for more than five years. Clear and convincing evidence supports the district court's conclusion that Kornarens acted recklessly and in bad faith and his conduct caused unreasonably protracted and costly litigation over a frivolous copyright claim. Accordingly, sanctions were not an abuse of discretion.

IV

[5] Kornarens challenges the reasonableness of the $258,206.04 award. He suggests that if the imposition of sanctions is upheld, the amount should not exceed $21,310.26. However, the district court's sanctions order explains in detail its reduction of defendants' claimed $894,539.44 in attorneys' fees

and costs. The award is explicitly limited to excess costs and fees incurred in defending against Lahiri's copyright infringement claim, and excludes litigation expenses for his dismissed Lanham Act and unfair competition claims. The award therefore excludes all fees and costs incurred before September 1, 2003.

The district court used a traditional lodestar analysis of defendants' contemporaneous billing records. Because defendants used single entries for tasks pertaining to both Saregama and Lahiri's consolidated copyright claims, the district court apportioned only half of the billings to Lahiri. This was a conservative approach. The record reflects that Kornarens initiated most of the litigation activity resulting in defendants' excessive fees and costs. An apportioned percentage is not an abuse of discretion because it would be impossible to determine with mathematical precision the fees and costs generated only by Kornarens. *The Traditional Cat Ass'n, Inc. v. Gilbreath,* 340 F.3d 829, 834-35 (9th Cir.2003); *Salstrom v. Citicorp Credit Servs., Inc.,* 74 F.3d 183, 185 (9th Cir.1996).

The district court reviewed samples from the fee application and calculated an 80% block billing rate. The district court identified attorneys and paralegals who *1223 were primarily responsible for block billing, and reduced 80% of their billable hours by 30%. This was permissible and not an abuse of discretion. *Welch v. Metro. Life Ins. Co.,* 480 F.3d 942, 948 (9th Cir.2007) (citing California State Bar's Committee on Mandatory Fee Arbitration's report that block billing may increase time by 10 to 30%). The district court further excluded fees incurred because of court-requested supplemental information and made an additional 10% across-the-board reduction for excessive and redundant work. *Moreno v. City of Sacramento,* 534 F.3d 1106, 1112 (9th Cir.2008). This was a reasoned exercise of discretion.

In reducing defendants' recovery of costs by $82,978.68, the district court carefully excluded inadequately documented costs, as well as taxable costs not included in defendants' bill of costs. The significantly reduced award of recoverable costs was reasonable and not an abuse of discretion.

V
CONCLUSION

The district court's authority to sanction attorneys under § 1927 and its inherent disciplinary power must be exercised with restraint and discretion. The record demonstrates by clear and convincing evidence that Kornarens engaged in a pattern of bad faith litigation conduct over an extended time period. He pursued a meritless copyright infringement claim that directly resulted in excess fees and costs. Beyond question, Kornarens acted recklessly. The district court did not abuse its discretion in awarding reasonable and carefully considered attorneys' fees and costs.

AFFIRMED.

C.A.9 (Cal.),2010.
Lahiri v. Universal Music and Video Distribution Corp.
606 F.3d 1216, 2010 Copr.L.Dec. P 29,931, 94 U.S.P.Q.2d 1950, 10 Cal. Daily Op. Serv. 7027, 2010 Daily Journal D.A.R. 8330

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675 F.2d 1319, 28 Fair Empl.Prac.Cas. (BNA) 1134, 28 Empl. Prac. Dec. P 32,665, 219 U.S.App.D.C. 94
(Cite as: 675 F.2d 1319, 219 U.S.App.D.C. 94)

▷

United States Court of Appeals,
District of Columbia Circuit.
NATIONAL ASSOCIATION OF CONCERNED VETERANS, et al., Appellees/Cross-Appellants,
v.
SECRETARY OF DEFENSE, et al., Appellants/Cross-Appellees.
Mark GREEN and Corporate Accountability Research Group
v.
DEPARTMENT OF COMMERCE, Appellant.
Beverly L. B. PARKER
v.
SECRETARY OF TRANSPORTATION, Appellant.

Nos. 81-1364, 81-1424, 81-1791 and 81-1965.
Argued Feb. 25, 1982 in No. 81-1965.
Submitted on Briefs Feb. 25, 1982 in Nos. 81-1364, 81-1424.
Argued Feb. 26, 1982 in No. 81-1791.
Decided April 23, 1982.
As Amended July 15, 1982.

In two Freedom of Information Act cases, and one Title VII action, government appealed from orders of the United States District Court for the District of Columbia, Charles R. Richey, J., awarding prevailing plaintiffs attorney fees. The Court of Appeals, after listing the obligations of attorney fee applicants in documenting their claims and defining procedures to be followed in the district court when opposition to a requested fee award is noted, held that the records did not support the attorney fees awarded in the three cases.

Vacated and remanded.

Tamm, Circuit Judge, filed a concurring opinion.

West Headnotes

[1] Federal Civil Procedure 170A ⚿2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)

Applicant for attorney fees is required to provide specific evidence of prevailing community rate for type of work for which he seeks award; generalized information and belief affidavits from friendly attorneys presenting wide range of hourly rates will not suffice.

[2] Federal Civil Procedure 170A ⚿2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases
(Formerly 170Ak2737)

Recent fees awarded by court or through settlement to attorneys of comparable reputation and experience performing similar work are useful guides in setting appropriate rate of attorney fees.

[3] Federal Civil Procedure 170A ⚿2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)

To be useful, affidavit stating attorney's opinion as to market rate of attorney fees should be as specific as possible, e.g., it should state whether stated hourly rate is present or past one, whether rate is for specific type of litigation or for litigation in general, and whether rate is average one or one specifically for attorney with particular type of experience or qualifications.

[4] Federal Civil Procedure 170A ⚿2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)

Affidavit in support of award of attorney fees should state factual basis for affiant's opinion as to market rate and best evidence would be hourly rate customarily charged by affiant himself by his law firm, or alternatively, affidavit might state that stated rate is based on affiant's personal knowledge of specific rate charged by other lawyers or rates for similar litigation.

[5] Federal Civil Procedure 170A ⚿2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)

Counsel for attorney fee applicant may be required to submit specific evidence of his or her actual billing practices during relevant time period, if in fact applicant has billing practice to report, which will provide important substantiating evidence of prevailing community rate, and actual rate that applicant's counsel can command in market is itself highly relevant proof of prevailing community rate.

[6] Federal Civil Procedure 170A ⚿2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases
(Formerly 170Ak2737)

Where counsel customarily exercises billing judgment by not billing at market rate or for full amount of time expended, this fact must be considered in calculating counsel's true billing rate in determining award of attorney fees, and counsel should supply data showing fees earned both in cases in which counsel prevailed and in which he lost.

[7] Federal Civil Procedure 170A ⚿2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)

Once attorney fee applicant has provided support for requested rate, burden falls on Government to go forward with evidence that rate is erroneous and when Government attempts to rebut case for requested rate, it must do so by equally specific countervailing evidence; although there may be occasions in which applicant's showing is so weak that Government may without more simply challenge rate as unsubstantiated, in normal case Government must either accede to applicant's requested rate or provide specific contrary evidence tending to show that lower rate would be appropriate.

[8] Federal Civil Procedure 170A ⚿2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)

Evidence submitted by attorney fee applicants in prior cases may be relied on in compiling attorney fee application and probativeness of such prior submissions will depend on comparability of attorneys in terms of skill, nature of cases, and currency of information.

[9] Federal Civil Procedure 170A ⚿2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs

170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)
Because applicant for attorney fees is only entitled to award for time reasonably expended, fee application must contain sufficiently detailed information about hours logged and work done.

[10] Federal Civil Procedure 170A ⚖2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)
Casual after-the-fact estimates of time expended on case are insufficient to support award of attorneys' fees, but attorneys who anticipate making fee application must maintain contemporaneous, complete and standardized time records which accurately reflect work done by each attorney.

[11] Federal Civil Procedure 170A ⚖2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)
In preparation of attorney fee application, it is insufficient to provide district court with very broad summaries of work done and hours logged, though application need not present exact number of minutes spent, precise activity to which each hour was devoted or specific attainment of each attorney.

[12] Federal Civil Procedure 170A ⚖2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)
Application for attorney fees must be sufficiently detailed to permit district court to make independent determination of whether hours claimed are justified; better practice is to prepare detailed summaries based on contemporaneous time records indicating work performed by each attorney for whom fees are sought.

[13] Records 326 ⚖68

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k68 k. Costs and Fees. Most Cited Cases
(Formerly 170Ak2737.6)
Attorney fees are not recoverable for nonproductive time, nor, at least in context of Title VII and Freedom of Information Act, for time expended on issues on which plaintiff did not ultimately prevail and fee application should therefore indicate whether nonproductive time or time expended on unsuccessful claims was excluded and, if time was excluded, nature of work and number of hours involved should be stated. 5 U.S.C.A. § 552; Civil Rights Act of 1964, § 701 et seq., as amended 42 U.S.C.A. § 2000e et seq.

[14] Federal Civil Procedure 170A ⚖2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases
(Formerly 170Ak2737)
It is unnecessary to increase attorney fee award to reflect risk that suit would not be successful if counsel would have been paid by his client regardless of the outcome.

[15] Federal Civil Procedure 170A ⚖2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases
(Formerly 170Ak2737)

Initial inquiry in determining whether premium for risk should be awarded in attorney fee must focus on terms of any agreement between applicant and his counsel relating to fees and better practice would be for applicant to include copy of any such agreement in fee application; in any event, applicant should state whether any fee arrangement exists and recite its precise terms.

[16] Federal Civil Procedure 170A ⚿2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)

Attorney fee applicant should clearly identify specific circumstances of case which support risk adjustment in amount requested.

[17] Federal Civil Procedure 170A ⚿2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)

Applicants for attorney fees should attempt to present proposed lodestar billing rate exclusive of any risk premium, since if award for risk is appropriate it can then be presented as separate matter.

[18] Federal Civil Procedure 170A ⚿2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases
(Formerly 170Ak2737)

Lodestar attorney fee may be adjusted upward to compensate counsel for loss of value of money he would have received resulting from delay in receipt of payment.

[19] Federal Civil Procedure 170A ⚿2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases
(Formerly 170Ak2737)

Minimal delay may be ignored by district court in setting attorney fee award and delay solely attributable to dilatory actions by plaintiff should also be discounted; any claim for adjustment to compensate for delay must be factually supported and district court's award must be explained in light of circumstances of case; where hourly rate used in computing lodestar is based on present hourly rates, a delay factor has implicitly been recognized and no adjustment for delay should be allowed.

[20] Federal Civil Procedure 170A ⚿2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases
(Formerly 170Ak2737)

Adjustment based on quality of representation is only appropriate if representation has been unusually good or bad, taking into account level of skill normally expected of attorney commanding hourly rate used to compute the lodestar.

[21] Federal Civil Procedure 170A ⚿2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements.

Most Cited Cases
(Formerly 170Ak2737)
To support adjustment of attorney fees award on basis of quality of representation, applicant must specifically request such adjustment and state why it is warranted and, since district court is uniquely qualified to assess quality of counsel's performance, adjustment of lodestar based on this factor rests peculiarly in court's discretion, but adjustment should be supported by factual considerations, not generalities.

[22] Records 326 ⇐68

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k68 k. Costs and Fees. Most Cited Cases
(Formerly 170Ak2737.6)
Because Title VII and Freedom of Information Act authorize only reasonable awards of attorney fees, opponent is entitled to information it requires to appraise reasonableness of fee requested so that it may present any legitimate challenges to application. 5 U.S.C.A. § 552; Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

[23] Federal Civil Procedure 170A ⇐2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)
Justification for claimed billing rate and nature and extent of work done by counsel on various phases of case is essential in calculation of attorney fee award and opposing counsel should have access to this information as matter of right.

[24] Federal Civil Procedure 170A ⇐2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)
It is not expected that attorney fee contests should be resolved only after type of searching discovery that is typical when issues on merits are presented, but trial court retains substantial discretion based on its view of submissions as a whole to guide any further inquiry.

[25] Federal Civil Procedure 170A ⇐1271

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1271 k. Proceedings to Obtain. Most Cited Cases
Discovery request concerning award of attorney fees should be precisely framed and promptly advanced before final opposition papers are filed and unfocused requests to initiate discovery without indicating its nature or extent serves no purpose; district court has full discretion to deny such requests and, if it finds that discovery is being pursued solely to cause delay or for other improper purposes, it may apply appropriate sanctions.

[26] Federal Civil Procedure 170A ⇐2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)
When district court determines that documentation accompanying fee application and discovery materials provides adequate factual basis for attorney fee award, it may in its discretion decline to hold hearing; however, procedural fairness requires that hearing be held where in district court's view material issues of fact that may substantially affect size of award remain in well-founded dispute.

[27] Federal Civil Procedure 170A ⚖2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)

District court's discretion in determining need for hearing on application for attorney fees should be exercised in light of fact that interests of justice will be served by awarding prevailing party his fees as promptly as possible and district court has appropriate power to prevent opponent of fair award from engaging in purely vindictive contest over fees.

[28] Records 326 ⚖68

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k68 k. Costs and Fees. Most Cited Cases
(Formerly 170Ak2737.6)

Prevailing plaintiffs in Freedom of Information Act suit failed to provide adequate factual support for hourly rates claimed and district court lacked adequate record to fix lodestar rate of attorney fees where district court relied on rates awarded in unrelated Title VII case in order to set hourly rate, plaintiffs filed conclusory "information and belief" affidavits, which were of no evidentiary value to district court in setting proper rate, and other evidence included widely disparate rates awarded in three other cases, all of which were settled by government in advance of Court of Appeals' adoption of "market-value" approach to fee awards. 5 U.S.C.A. § 552; Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

[29] Federal Civil Procedure 170A ⚖2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases
(Formerly 170Ak2737)

Although no compensation in form of attorney fees may be given for hours spent litigating issues upon which plaintiff did not ultimately prevail, district court was not required to engage in minute examination of each theory or claim advanced and what results it did or did not produce.

[30] Federal Civil Procedure 170A ⚖2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)

District court's statement of factors to be considered in determining appropriate multiplier for attorney fee award and its statement that, upon consideration of entire record, it found that multiplier of 10% was fair and reasonable, was inadequate statement of reasons for awarding multiplier.

[31] Federal Civil Procedure 170A ⚖2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases
(Formerly 170Ak2737)

If billing rate used in calculating lodestar for attorney fee award already included allowance for contingency that suit would not be success, multiplier could not subsequently be applied to lodestar figure itself.

[32] Records 326 ⚖68

326 Records
326II Public Access
326II(B) General Statutory Disclosure Re-

quirements
326k61 Proceedings for Disclosure
326k68 k. Costs and Fees. Most Cited Cases
(Formerly 170Ak2737.6)

Affidavit prepared by prevailing plaintiff's lead counsel stating his information and belief concerning prevailing rates charged by attorneys, citations to recent Freedom of Information Act or Privacy Act cases in the district, copies of stipulations in two FOIA cases in which government agreed to certain rates, and affidavits describing training and professional accomplishments of counsel, were inadequate basis on which to determine hourly rates for purposes of attorney fee award. 5 U.S.C.A. § 552; Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

[33] Federal Civil Procedure 170A ⚷1269.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1269 Grounds and Objections
170Ak1269.1 k. In General. Most Cited Cases
(Formerly 170Ak1269)

On motion for award of attorney fees by prevailing plaintiffs in Freedom of Information Act cases, discovery should have been allowed to test accuracy of plaintiffs' documentation of hours expended by attorneys. 5 U.S.C.A. § 552; Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

[34] Federal Civil Procedure 170A ⚷2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases
(Formerly 170Ak2737)

In awarding attorney fees, compensable time should not be limited to hours expended within four corners of litigation; however, there must be clear showing that time was expended in pursuit of successful resolution of case in which fees are being claimed.

[35] Federal Civil Procedure 170A ⚷2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases
(Formerly 170Ak2737)

In awarding attorney fees, lodestar figure could not be adjusted because case involved appeal.

[36] Civil Rights 78 ⚷1594

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1585 Attorney Fees
78k1594 k. Amount and Computation. Most Cited Cases
(Formerly 78k418, 78k46(29), 78k46)

Award of attorney fees in Title VII action could not be adjusted for inflation and experience, since relevant datum is prevailing community rate for attorneys of similar qualifications performing similar work, not what rate would be desirable in order to keep pace with inflation or to reward increasing legal experience. 5 U.S.C.A. § 552; Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

[37] Federal Civil Procedure 170A ⚷2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases
(Formerly 170Ak2737)

Attorney fees could be allowed for hours spent by counsel conferring together about case, on theory that attorneys must spend at least some of their time conferring with colleagues, particularly their

subordinates, to ensure that case is managed in effective as well as efficient manner.

[38] Federal Civil Procedure 170A ⇐2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney Fees. Most Cited Cases
(Formerly 170Ak2737)
Any right to hearing on motion for attorney fees was waived where no hearing was requested.

***1322 **97** Appeals from the United States District Court for the District of Columbia (D.C.Civil Action Nos. 79-0211, 77-0363 and 79-3443).Charles F. C. Ruff, U. S. Atty., Washington, D. C., at the time the briefs were filed, and Royce C. Lamberth and Kenneth M. Raisler, Asst. U. S. Attys., Washington, D. C., were on the briefs, for appellants in all cases. Cheryl M. Long, Asst. U. S. Atty., Washington, D. C., was also on the brief, for appellant in No. 81-1965.

Barton F. Stichman, David F. Addlestone, and Ronald Simon, Washington, D. C., were on the brief, for appellees in No. 81-1364.

John Oliver Birch, Asst. U. S. Atty., Washington, D. C., argued on behalf of appellants in No. 81-1791 and No. 81-1965.

David C. Vladeck, Washington, D. C., with whom Alan B. Morrison, Washington, D. C., was on the brief, argued on behalf of appellees in No. 81-1791.

Charles Stephen Ralston, New York City, with whom Jack Greenberg, New York City, was on the brief, argued on behalf of appellees in No. 81-1965.

***1323 **98** Before TAMM and WILKEY, Circuit Judges, and GERHARD A. GESELL, [FN*] United States District Judge for the District of Columbia.

FN* Sitting by designation pursuant to 28 U.S.C. s 292(a) (1976).

Opinion PER CURIAM.

Concurring opinion filed by Circuit Judge TAMM.

PER CURIAM:

In each of the three captioned appeals the United States challenges the award by the District Court of attorneys' fees to the successful plaintiffs below. These appeals are consolidated for convenience in this single opinion because they raise common questions relating to the application of this Court's Copeland III decision. Copeland v. Marshall, 641 F.2d 880 (D.C.Cir.1980) (en banc).

Two of these cases were brought under the Freedom of Information Act, 5 U.S.C. s 552 (1976) ("FOIA"), and the third arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. s 2000e et seq. (1976). The District Court awarded a fee in each case only after first determining that claimant had "prevailed" and was otherwise entitled to a fee award in some amount.[FN1] In each instance the District Court then attempted to apply the "market value" approach approved in Copeland III in order to determine an appropriate fee. [FN2] On appeal the United States does not challenge appellees' entitlement to attorneys' fees but contends that the awards failed to comply with the requirements of Copeland III and that the level of the fees is excessive.

FN1. The fee provision of Title VII provides:

> In any action or proceeding under ... (Title VII) the court, in its discretion, may allow the prevailing party, other than the (Equal Employment Opportunity) Commission or the United States, a reasonable attorney's fee as part of the

costs, and the Commission and the United States shall be liable for costs the same as a private person. 42 U.S.C. s 2000e-5(k) (1976).

The FOIA fee provision provides:

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed. 5 U.S.C. s 552(a)(4)(E) (1976).

To be entitled to a fee award a claimant under FOIA must satisfy certain eligibility criteria not applicable in Title VII cases. See Fund for Constitutional Govt. v. National Archives, 656 F.2d 856, 872 (D.C.Cir.1981); Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 711-12 (D.C.Cir.1977).

FN2. The "market value" approach adopted in Copeland III set the standard for award of counsel fees in Title VII litigation. That approach has, however, been accepted as applicable with appropriate modifications in other types of civil cases in which an award of attorneys' fees is authorized by statute. See Environmental Defense Fund, Inc. v. EPA, 672 F.2d 42 (D.C.Cir., 1982) (Toxic Substances Control Act); Etta v. Seaboard Enterprises, Inc., 674 F.2d 913 (D.C.Cir.1982) (Truth-in-Lending Act). We find that the Copeland III formula is fully applicable to the calculation of a FOIA fee award once the claimant has established his entitlement to a fee award under that Act. See note 1, supra.

The initial task in determining an appropriate fee award under Copeland III [FN3] is to establish the "lodestar": the number of hours reasonably expended multiplied by a reasonable hourly rate. 641 F.2d at 891. A reasonable hourly rate was defined in Copeland III as that prevailing in the community for similar work. Id. at 892. Once established, the lodestar may be adjusted to reflect various other factors. The Court noted that a premium should generally be awarded if counsel would have obtained no fee in the event the suit was unsuccessful or if the fee award is made long after the services were rendered. Id. at 892-93. In addition, it indicated that the lodestar figure may be either increased or reduced to recognize legal representation of unusually superior or inferior quality. Id. at 893-94. Recognizing that some of the elements of this formula were necessarily somewhat imprecise, the Court emphasized that "we ask only that the district court judges exercise their discretion as conscientiously as possible, and state their reasons as clearly as possible." Id. at 893.

FN3. This Court, in somewhat special circumstances, recognized that neither fee applicants nor the Court must necessarily resort to the Copeland III methodology in order to calculate fee awards under other statutes. See Alabama Power Co. v. Gorsuch, 672 F.2d 1 at 3 n.10 (D.C.Cir., 1982).

The framework thus established by Copeland III placed a difficult burden on the District Courts which can only be met where fee applicants meet their correspondingly***1324 **99** heavy obligation to present well-documented claims. Our review of these appeals establishes that there is a definite need for a further definition of the obligations of attorney fee applicants in documenting their claims as well as a need to define more clearly procedures to be followed in the District Court when opposition to a requested fee award is noted. We vacate each of the awards here under review and remand for further proceedings consistent with the procedures appropriate for implementing Copeland III as outlined in Part I of this opinion. The specific deficiencies found in the record of each of the captioned cases are stated in Part II.

I.

For purposes of convenience our discussion will be under the following headings which are suggested by one or more of the cases before us.

(1) What type of factual showing is necessary to establish the prevailing hourly rate in the community for similar work?

(2) What type of factual showing is necessary to establish the number of hours reasonably expended on the case?

(3) What type of factual showing is necessary to support a claim for an adjustment to the lodestar?

(4) When should the District Court allow formal discovery against the fee applicant?

(5) When should the District Court conduct an evidentiary hearing on an attorney fee application?

In resolving these issues the Court recognizes several competing concerns. The District Court must, of course, be supplied with sufficient information to determine a reasonable and equitable fee. Obviously, fee applications should not be rigidly confined to a single mold and experience will suggest appropriate variations, but there is a need to indicate the minimum documentation which should be presented to a District Court before it may act on a fee application. Procedural fairness also requires that the party opposing the fee be permitted the opportunity to scrutinize the reasonableness of the fee requested and to present any legitimate objections. The opponent of the fee award has a right to utilize all reasonable means to resolve any significant factual dispute that would substantially affect the size of the award.

But contests over fees should not be permitted to evolve into exhaustive trial-type proceedings. [FN4] Apart from the burden this would impose on District Courts, many factors used in calculating the fee award can usually be resolved with a reasonable degree of accuracy based on an adequately documented fee application. Other elements of the Copeland III formula, in particular any adjustment in the lodestar to reflect the risk that the suit would be unsuccessful or to recognize unusually good or bad representation, may be resolved by the District Court through a qualitative evaluation based primarily on the Court's own observation and facts readily submitted through the application itself. More importantly, attorneys would be deterred from undertaking FOIA and Title VII actions if each victory on the merits were inevitably but the prelude to an exhausting and uncertain battle over fees. This would frustrate the purposes of FOIA and Title VII.

> FN4. The Court in Copeland III rejected the so-called "cost-plus" approach in part because it believed that approach would entail a "monumental inquiry on an issue wholly ancillary to the substance of the lawsuit." 641 F.2d at 896.

With these general considerations in mind we turn to consider each of the issues listed above. A full discussion of the key elements in fee determination is necessary to guide resolution of these cases on remand and to emphasize the need to develop a more standardized approach for future application of our controlling decision in Copeland III.[FN5]

> FN5. The primary emphasis in Copeland III was on the steps the District Courts should take in computing a fee award. 641 F.2d at 891-94. The Court did not have occasion to elaborate on the circumstances when discovery or a hearing were required since neither had been requested by the government in the District Court, 641 F.2d at 905, nor did it discuss in any detail the nature of the submissions required.

(1) What type of factual showing is necessary to establish the prevailing rate in the community for similar work?

The key issue in establishing the proper lodestar is to determine the reasonable hourly rate

"prevailing in the community for similar work." 641 F.2d at 892. The *1325 **100 Court in Copeland III indicated that some "relevant considerations" included "the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case." Id. The Court also noted that the hourly rate should generally depend on the experience of the attorney and the type of work involved. Id. However, no guidance was provided as to the nature of the submission an applicant for a statutory fee award should make in the District Court to support the hourly rate requested.[FN6]

> FN6. In Alabama Power Co. v. Gorsuch, 672 F.2d 1 (D.C.Cir., 1982), and Environmental Defense Fund, Inc. v. EPA, 672 F.2d 42 (D.C.Cir., 1982), the Court upheld the rates requested without discussing the adequacy of the documentary submissions. However, in those cases the government did not challenge the reasonableness of the rates, Alabama Power Co., at 4; Environmental Defense Fund, Inc., at 58 & n.11, and the Court therefore had no reason to inquire into the adequacy of the submissions on this issue.

Setting a prevailing hourly rate has proven more difficult than perhaps may have been contemplated. Lawyers organize their practice in many different ways and employ a variety of billing techniques. Some counsel, including those associated with the more substantial firms in this city, have well-established billing practices and generally receive remuneration from their clients on a regular basis. The hourly rate obtained by an individual attorney will vary, however, not only according to the various factors enunciated in Copeland III, but also depending on his personal professional interests and the ability of his clients to pay. On the other hand, lawyers associated with public interest groups or single practitioners who specialize in Title VII or FOIA cases, for example, may obtain all or most of their fees from fee awards. Attorneys in this second group may not have an established "billing rate" that reflects how their own services have been valued in the market. Other lawyers undoubtedly fall somewhere between these two stereotypes. Sharp inflation has made even more difficult the judicial task of determining a prevailing rate since inflation perforce induces rapid change in billing practices.

[1][2]The complexity of the market for legal services does not, however, reduce the importance of fixing the prevailing hourly rate in each particular case with a fair degree of accuracy. An applicant is required to provide specific evidence of the prevailing community rate for the type of work for which he seeks an award. For example, affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases provide prevailing community rate information. Recent fees awarded by the courts or through settlement to attorneys of comparable reputation and experience performing similar work are also useful guides in setting an appropriate rate. [FN7]

> FN7. It should be recognized that fees awarded in other cases are probative of the appropriate community rate only if they were determined based on actual evidence of prevailing market rates, the attorneys involved had similar qualifications, and issues of comparable complexity were raised. These difficulties emphasize the need for courts to seek out additional evidence of community rates. Such caveats notwithstanding, data about fee awards in other cases help to ensure comparable treatment of like cases.
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> As the source of fees awarded, the government has a clear interest in assembling useful information based on recent attorney fee awards in similar cases to assist the District Courts in determining reasonable fees. A blunderbuss array of cases specifically selected to support a low hourly rate does not assist the Dis-

> trict Court in determining the prevailing community rate. Carefully selected cases organized in a meaningful fashion, on the other hand, would be extremely useful.

[3][4] On the other hand, generalized and conclusory "information and belief" affidavits from friendly attorneys presenting a wide range of hourly rates will not suffice. To be useful an affidavit stating an attorney's opinion as to the market rate should be as specific as possible. For example, it should state whether the stated hourly rate is a present or a past one, whether the rate is for a specific type of litigation or for litigation in general, and whether the rate is an average one or one specifically for an attorney with a particular type of experience or qualifications. The affidavit should also state the factual basis for the affiant's opinion. The best evidence would be the hourly rate customarily charged by the affiant himself or by his law firm. Alternatively, the affidavit might state that the ***1326** ****101** stated rate is based on the affiant's personal knowledge about specific rates charged by other lawyers or rates for similar litigation.

This does not mean that the affidavit t mean that the affidavit must be replete with names of other attorneys and firms or otherwise filled with minute details, as these may be difficult to obtain. But when the attorney states his belief as to the relevant market rate, he should be able to state, for example, that it was formed on the basis of several specific rates he knows are charged by other attorneys. The District Court's task is to determine the approximate market rate. Its inquiry is aided little by an affidavit which just offers one attorney's conclusory and general opinion on what that rate is. Nor is it helpful if the affiant simply states that he is familiar with the attorney and the litigation and that he thinks the fee request is reasonable. What is needed are some pieces of evidence that will enable the District Court to make a reasonable determination of the appropriate hourly rate.

[5] In addition, counsel for applicants may be required to submit specific evidence of his or her actual billing practice during the relevant time period, if in fact applicant has a billing practice to report.[FN7a] T his information, when available, will provide important substantiating evidence of the prevailing community rate.[FN8] In Copeland III this Court indicated that the hourly rate allowed should reflect, among other things, the level of skill necessary to conduct the case and the attorney's reputation. 641 F.2d at 892. These, of course, are also factors that tend to determine the rate that the attorney is able to command in the marketplace for similar work. Accordingly, the actual rate that applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate.

> FN7a. If the applicant is a public interest attorney who does not do any work for fees he does not need to submit any evidence in this regard, nor does he need to submit information about his salary. See Copeland III, 641 F.2d at 898.

> FN8. See City of Detroit v. Grinnell Corp., 495 F.2d 448, 473 (2d Cir. 1974); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973).

[6] It may be essential to this inquiry that counsel's billing practice be accurately documented. A fee applicant should be required to state the rate at which he actually billed his time in other cases during the period he was performing the services for which he seeks compensation from defendant. This rate is not what he would have liked to receive, or what the client paid in a single fortunate case, but what on average counsel has in fact received. It is obvious that where counsel customarily exercises billing judgment by not billing at the market rate or for the full amount of time expended this fact must be considered in calculating counsel's true billing rate.[FN9] Unless the applicant wishes the District Court to assume that applicant's individual rate claimed includes an allowance for the contingent

nature of the suit, the applicant should supply data showing fees earned both in cases in which counsel prevailed and in which he lost. [FN10]

> FN9. As discussed at p. 1328, precise calculation of the reasonable hourly billing rate will significantly aid the District Court in determining an appropriate adjustment, if necessary, for the risk that no fee would be recovered if the suit were unsuccessful.
>
> FN10. Adding the contingency factor to a lodestar computed at prevailing hourly rates could lead to double counting of the contingency factor. This risk of double counting will be reduced if the submission includes data on cases both won and lost.

[7] Once the fee applicant has provided support for the requested rate, the burden falls on the Government to go forward with evidence that the rate is erroneous. And when the Government attempts to rebut the case for a requested rate, it must do so by equally specific countervailing evidence. Although there may be occasions in which the applicant's showing is so weak that the Government may without more simply challenge the rate as unsubstantiated, in the normal case the Government must either accede to the applicant's requested rate or provide specific contrary evidence tending to show that a lower rate would be appropriate.

[8] Evidence submitted by attorney fee applicants in prior cases may also be relied on in compiling an attorney fee application. There is no requirement that each attorney develop all of the evidence for the hourly rate he seeks from scratch. The probativeness*1327 **102 of such prior submissions will depend on the comparability of the attorneys in terms of skill, the nature of the cases and the currency of the information. Hopefully a more uniform structure for rate determination will evolve. While this depends considerably upon the stability of charges in the area the process will be facilitated if Government counsel develop an ability to inform the court and litigants of pertinent current factual affidavits filed in other comparable cases.

(2) What type of factual showing is necessary to establish the number of hours reasonably expended on the case?

[9] An applicant for attorneys' fees is only entitled to an award for time reasonably expended. Thus the fee application must also contain sufficiently detailed information about the hours logged and the work done. This is essential not only to permit the District Court to make an accurate and equitable award but to place government counsel in a position to make an informed determination as to the merits of the application.

[10] Casual after-the-fact estimates of time expended on a case are insufficient to support an award of attorneys' fees. Attorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney. As stated by the Court of Appeals for the Second Circuit, "any attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent." In re Hudson & Manhattan R. R. Co., 339 F.2d 114, 115 (2d Cir. 1964); accord, In re Wal-Feld Co., 345 F.2d 676, 677 (2d Cir. 1965).

[11][12] In the preparation of fee applications it is insufficient to provide the District Court with very broad summaries of work done and hours logged. Copeland III recognized that the fee application need not present "the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney." Copeland III, 641 F.2d at 891, (quoting Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973)). But the application must be sufficiently detailed to permit the District Court to make an independent determination whether or not the hours claimed are justified. The better practice is to prepare detailed summaries based on contemporaneous time records indicating the work per-

formed by each attorney for whom fees are sought. [FN11] In any event, once the reasonableness of the hours claimed becomes an issue, the applicant should voluntarily make his time charges available for inspection by the District Court or opposing counsel on request. [FN12]

> FN11. In Environmental Defense Fund, Inc. v. EPA, 672 F.2d 42 (D.C.Cir., 1982), the Court made a fee award based on the following submission in support of the hours claimed:
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> "(1) daily time sheets for attorneys Warren and Butler;
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> (2) written declaration from attorneys Warren, Butler and Lennett describing in detail the precise nature of the work performed by them, the hours attributed to each category of work, the approximate numbers of hours discounted as potentially "duplicative" or "nonproductive" and the approximate dates when each category of work was performed;
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> (3) an affidavit from Jacqueline Warren describing the history of the litigation, the litigation goals and strategies of EDF, and the qualifications of each of the participating attorneys."
>
> At 54.
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> The Court found that this detailed submission provided more than adequate support for the hours claimed. Id.

> FN12. The usefulness of submitting actual time charges to support a fee request has been recognized by this and other courts. See, e.g., Laje v. R. E. Thompson General Hospital, 665 F.2d 724, 730 (5th Cir. 1982); Pete v. UMW Welfare & Retirement Fund, 517 F.2d 1275, 1292 (D.C.Cir.1975) (en banc). Since the applicant is required in any event to collect the relevant time charges in order to calculate his hours, the additional burden imposed by requiring the applicant to make time charges available to opposing counsel or the Court is small.

[13] Fees are not recoverable for nonproductive time nor, at least in the context of Title VII and FOIA, for time expended on issues on which plaintiff did not ultimately prevail.[FN13] 641 F.2d at 891. The fee application should therefore indicate whether nonproductive time or time expended on unsuccessful claims was excluded and, if time was excluded, the nature of the work ***1328 **103** and the number of hours involved should be stated.

> FN13. In stating that no compensation was due for time spent litigating issues upon which plaintiff did not prevail, the Court in Copeland III emphasized that the courts should adopt a practical approach to this inquiry and time should be excluded "only when the claims asserted 'are truly fractionable.' " Copeland III, 641 F.2d at 892 n.18 (quoting Lamphere v. Brown Univ., 610 F.2d 46, 47 (1st Cir. 1979)).

(3) What type of factual showing is necessary to support a claim for an adjustment to the lodestar?

Once the lodestar has been adequately documented, the applicant may under appropriate circumstances request an adjustment of the lodestar based on the considerations enunciated in Copeland III, 641 F.2d at 892-94.[FN14] Copeland III listed three adjustment factors: extra compensation for the risk that the lawsuit would be unsuccessful and that counsel would receive no fee; extra compensation for delay in receipt of payment for services; and either an up or down adjustment to reflect unusually good or bad representation "taking into account the level of skill normally expected of an attorney commanding the hourly rate used to compute the 'lodestar.' " 641 F.2d at 892-94 (emphasis in original). The Court emphasized that "(t)he burden of justifying any deviation from the 'lodestar' rests on

the party proposing the deviation." Id. at 892.

> FN14. Copeland III did not purport to establish an exhaustive list of factors to be considered in adjusting the lodestar in contexts other than Title VII. 641 F.2d at 892 n.22. Only one factor not mentioned in Copeland III has been advanced to support a multiplier award, which we reject. See p. 1335. It is therefore unnecessary to consider how claims based on other factors should be documented.

[14] The purpose of adjusting the lodestar to reflect the contingent nature of a suit is to provide adequate compensation to counsel who undertake Title VII and FOIA work. Accordingly, some compensation for this factor is appropriate only if counsel would have received no significant remuneration if the suit were not successful. It is unnecessary to increase an attorney fee award to reflect the risk that the suit would not be successful if counsel would have been paid by his client regardless of the outcome.

[15] The initial inquiry therefore in determining whether a premium for risk should be awarded must focus on the terms of any agreement between the applicant and his counsel relating to fees. The better practice would be for the applicant to include a copy of any such agreement in the fee application. In any event, the applicant should state whether any fee arrangement exists and recite its precise terms.

[16] Once the applicant has established an entitlement to some kind of adjustment to the fee award because of the risk factor he must provide specific support for the risk premium requested. The task of the District Court in setting the risk premium is "inherently imprecise." 641 F.2d at 893. But the difficulties of the District Court should not be compounded by vague assertions in the fee application about why the applicant is entitled to a risk premium. At a minimum, the fee applicant should clearly identify the specific circumstances of the case which support a risk adjustment in the amount requested.

[17] Copeland III emphasized that no premium for risk should be awarded where the hourly rate used in calculating the lodestar already contains an allowance for the possibility that the suit would not succeed and no fee would be obtained. 641 F.2d at 893. As a practical matter, however, the task of courts as well as fee applicants will be lightened if the lodestar fee requested does not include a risk premium. So long as the contingency factor is ignored in calculating the hourly lodestar rate it should be possible for the District Court, with experience, to develop fairly well-established community rates for particular types of work. Applicants should therefore attempt to present the proposed lodestar billing rate exclusive of any risk premium. If an award for risk is appropriate it can then be presented as a separate matter.

[18] The lodestar fee may also be adjusted upward to compensate counsel for the lost value of the money he would have received resulting from delay in receipt of payment. As stated in Copeland III, "(t)he hourly rates used in the 'lodestar' represent the prevailing rate for clients who typically pay their bills promptly. Court-awarded fees normally are received long after the legal services are rendered." 641 F.2d at 893.

[19] No precise formula is available to measure the delay factor. Some delay in receipt of payment is inevitable in the law as in any other service profession. Accordingly, any minimal delay may properly be ignored by the District Court in setting a fee award. Delay solely attributable to dilatory actions by plaintiff should also be discounted. Any claim for an adjustment to compensate for delay must be factually supported and the District Court's award must be explained in light of the circumstances ***1329** ****104** of the case. Finally, as indicated in Copeland III, where the hourly rate used in computing the lodestar is based on present hourly rates a delay factor has implicitly been recognized and no adjustment for delay should be allowed. 641 F.2d at 893 n.23.

[20] A final factor to be considered in adjusting the lodestar is the quality of the representation. An adjustment based on this factor is only appropriate, however, if the representation has been unusually good or bad "taking into account the level of skill normally expected of an attorney commanding the hourly rate used to compute the 'lodestar.' " 641 F.2d at 893. The Court could not have stated in clearer terms that an adjustment for the quality of representation should not be routinely awarded but only awarded in exceptional cases. An adjustment should not be made out of sympathy for claimant's cause or to mollify counsel because the lodestar figure claimed was reduced.

[21] To support an adjustment on this basis the applicant must specifically request such an adjustment and state why it is warranted. Since the District Court is uniquely qualified to assess the quality of counsel's performance an adjustment of the lodestar based on this factor rests peculiarly in the Court's discretion. But in recognition of the possibility of appellate review we emphasize that the adjustment should be supported by factual considerations, not generalities.

(4) When should the District Court allow formal discovery against the fee applicant?

[22] An issue left largely unresolved by Copeland III was the extent to which the opponent of a fee award is entitled to discovery. Both Title VII and FOIA authorize only "reasonable" awards of attorneys fees. Accordingly, the opponent is entitled to the information it requires to appraise the reasonableness of the fee requested and in order that it may present any legitimate challenges to the application to the District Court.

[23] In the cases before us discovery requests by the United States primarily related to the justification for the claimed billing rate and the nature and extent of the work done by the applicant's counsel on various phases of the case. This information is essential in the calculation of the fee award and opposing counsel should have access to this information as a matter of right. [FN15] If hourly time charges are automatically made available for inspection, as we have suggested, and the submissions supporting prevailing rates are fully documented, discovery demands can be sharply focused.

> FN15. Wolf v. Frank, 555 F.2d 1213, 1215 (5th Cir. 1977); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 382 F.Supp. 999, 1003 (E.D.Pa.1974), rev'd in part, aff'd in part, 540 F.2d 102 (3d Cir. 1976) (en banc).

[24] As we have noted, it is not expected that fee contests should be resolved only after the type of searching discovery that is typical where issues on the merits are presented. The trial court retains substantial discretion based on its view of the submissions as a whole to guide any further inquiry. The District Court has adequate power to assure that discovery requests relating to issues other than rates and hours are pointed to clearly relevant issues. The sound administration of justice requires a balanced, informed approach to fee awards accomplished in reasonable time without turning such matters into a full trial. In light of the broad policy objectives Congress sought to achieve through Title VII and FOIA, attorneys must not be deterred from engaging in this type of work by the prospect of protracted litigation over reasonable demands for compensation. Nor should the zeal of government counsel be permitted to require applicants to expend substantial additional time supporting fee claims which will only result in a request for more compensation for these additional labors.

[25] The United States has recently followed the practice in its opposition papers of seeking discovery by simply lodging a general request to take unidentified discovery. Discovery requests should be precisely framed and promptly advanced before final opposition papers are filed. The District Court and the applicant are entitled to have discovery demands in clear outline at an early stage after the fee application is filed. Unfocused requests to initiate discovery without indicating its nature or extent serve no purpose, and the District Court has full

discretion to deny such requests. Moreover, if the District Court finds that discovery is being pursued solely to cause delay or for other improper purposes, it may apply appropriate sanctions.

***1330 **105** (5) When should the District Court conduct an evidentiary hearing on an attorney fee application?

As Copeland III noted, no hearing was requested in that case and accordingly the Court did not have occasion to elaborate on the circumstances, if any, when an evidentiary hearing is required. 641 F.2d at 905. The cases before us directly raise the issue of whether and under what circumstances a hearing is required in statutory fee cases.

[26] Disputed issues of fact frequently can be adequately resolved by the documentation accompanying the fee application and through appropriate discovery lodged with the Court. When the District Court determines that the information generated by these procedures provides an adequate factual basis for an award it may in its discretion decline to hold a hearing.[FN16] On the other hand, procedural fairness requires that a hearing be held where in the District Court's view material issues of fact that may substantially affect the size of the award remain in well-founded dispute.[FN17] If a hearing is held it should, of course, be sharply focused upon those issues which the District Court believes will materially affect the award in light of the submissions of the parties as supplemented by appropriate discovery.

> FN16. See Copeland III, 641 F.2d at 905 n.57 (noting that a hearing is unnecessary where "the adversary papers filed by plaintiff and defendant ... adequately illuminate the factual predicate for a reasonable fee"). See also Manhart v. City of Los Angeles, 652 F.2d 904, 908 (9th Cir. 1981) ; Konczak v. Tyrrell, 603 F.2d 13, 19 (7th Cir. 1979), cert. denied, 444 U.S. 1016, 100 S.Ct. 668, 62 L.Ed.2d 646 (1980).
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> FN17. The need for the District Court to conduct a hearing to resolve material factual disputes has been recognized in other cases brought under various statutes containing fee provisions. See Herrera v. Valentine, 653 F.2d 1220, 1233 (8th Cir. 1981); Henson v. Columbus Bank & Trust Co., 651 F.2d 320, 330 (5th Cir. 1981); Harkless v. Sweeny Independent School Dist., 608 F.2d 594, 597 (5th Cir. 1979); Sargent v. Sharp, 579 F.2d 645, 647 (1st Cir. 1978). See also Etta v. Seaboard Enterprises, Inc., 672 F.2d 1 at 6 (D.C.Cir., 1982) (on remand district court may conduct hearing "if necessary"). Cf. Environmental Defense Fund, Inc. v. EPA, 672 F.2d 42 at 54 (D.C.Cir., 1982) (noting that a hearing may be appropriate where an application for attorneys' fees is filed in this Court).
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> The Court in Copeland III distinguished cases where the prevailing party seeks to recover fees directly from the loser from those involving recovery of a fee award from a "common fund" generated by a successful class action. 641 F.2d at 905 n.57. In the latter instance the Court suggested that "(a) hearing may be vital." Id. All of the cases cited in the government briefs on these appeals in support of the proposition that the District Court must conduct a hearing whenever the fee is contested are distinguishable on that basis. See City of Detroit v. Grinnell Corp., 495 F.2d 448, 472 (2d Cir. 1974); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 169-70 (3d Cir. 1973); Grunin v. International House of Pancakes, 513 F.2d 114, 127 (8th Cir. 1975).

[27] The District Court's discretion in determining the need for a hearing, as in fixing the scope of permissible discovery, should be exercised in light of the fact that the interests of justice will be

served by awarding the prevailing party his fees as promptly as possible. The District Court has adequate power to prevent the opponent of a fee award from engaging in a purely vindictive contest over fees.

Before turning to an analysis of the cases here under review, we express our concern that an unnecessary volume of attorney fee disputes are coming before the District Court as well as this Court. [FN18] More of these cases should be settled out of court. Having undertaken the task of defining the relevant record in attorney fee cases with greater precision the Court expresses its hope that litigants will be in a better position to resolve the relatively few genuine ***1331** ****106** factual disputes which should be raised by properly framed attorney fee applications.[FN19] If serious settlement negotiations are held, even if they may prove not entirely successful, it should be possible for the parties to narrow the issues that must be brought before the District Court.

FN18. The Clerk of the District Court advises that during the last two calendar years Title VII and FOIA cases alone have accounted for over ten percent of the District Court's workload. Other types of litigation also require the Courts to set attorneys' fees and the recently enacted Equal Access to Justice Act, 28 U.S.C.A. s 2412 (1981 Supp.), will tend to engender even more fee demands in the future. See Baez v. United States Dept. of Justice, 662 F.2d 792, 827, n.232 (D.C.Cir.1981) (dissenting opinion), vacated for rehearing en banc (August 18, 1981), (listing "some ninety federal statutes" which authorize fee awards). As some indication of the volume of fee cases in this Court, this panel heard two other appeals from awards of attorneys' fees in addition to the three discussed in this opinion. See Veterans Education Project v. Secretary of the Air Force, No. 81-1741 (D.C.Cir.); Donnell v. United States, Nos. 81-1471, 81-1545 (D.C.Cir.).

FN19. The District Court has sufficient power to enforce the standards provided in this opinion. Where a fee submission is manifestly inadequate, the District Court has no obligation to proceed further and denial is appropriate. In Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980), the Court said:

> (D)enial (of attorneys fees) is an entirely appropriate, and hopefully effective, means of encouraging counsel to maintain adequate records and submit reasonable, carefully calculated, and conscientiously measured claims when seeking statutory counsel fees. Id. at 1059.

II.

Each of the three cases before us will now be discussed separately in light of our observations above and the standards enunciated in Copeland III.

No. 81-1364/81-1424-National Association of Concerned Veterans, et al. v. Secretary of Defense, et al.

In this action appellees invoked FOIA in an effort to compel the Armed Services to publish, index and make available for public inspection certain military rules relied on in reviewing applications to modify administrative discharges from the military. After lengthy proceedings in the course of which the District Court issued a 25-page opinion on the merits of appellees' motion for a preliminary injunction, most of appellees' claims were resolved in their favor and the case was dismissed by praecipe. Upon consideration of appellees' motion for an award of attorney fees and costs and the government's opposition thereto the District Court made a fee award of $16,956.77, plus costs.

Appellants contend that the District Court erred in four respects. First, appellants challenge the District Court's use of the billing rate of $85.00 in computing the lodestar because it was not suppor-

ted by the record and was explained only by the fact that the District Court had allowed the same rate in a recent Title VII action.[FN20] Appellants also challenge the District Court's allowance of total hours claimed on the ground that some of this time was either unproductive or expended in pursuit of claims on which appellees did not prevail. The District Court's award of a ten percent multiplier is also challenged, primarily on the ground that the District Court failed adequately to explain why a multiplier was justified and because, to the extent that a multiplier award might have been justified based on the contingent nature of the suit, the Court nonetheless erred since the hourly rate proposed by appellees already included a contingency allowance. Finally, it is claimed that the District Court erred in not holding an evidentiary hearing and in denying appellants' discovery relating to the hours and rates claimed by appellees.

FN20. Appellees cross-appealed to preserve their right to seek a higher billing rate in the event of a remand.

The appellees provided the following information in support of their claim that $100 and $110 an hour were reasonable hourly rates for work performed by the two lead attorneys during 1979 and 1980:

(1) Generalized affidavits filed by each lead counsel stating only:

"I am informed that the current prevailing rate in Washington, D. C. for partners in law firms that specialize in military personnel law for litigating in federal court a case involving that area of law is from $100.00 to $125.00 per hour. Based on my experience in military personnel law and the Freedom of Information Act, I believe that the rate of $110.00 ($100.00) per hour is the current prevailing rate for an attorney of my experience in a case such as the instant case." [FN21]

FN21. Affidavits of David F. Addlestone and Barton F. Stichman, reprinted in Joint Appendix (J.A.) at 49 & 54.

(2) A copy of a stipulation dismissing a Privacy Act case against the military in which lead counsel in this case served as attorneys and received fees computed at $60 and $90 per hour for 18 hours of work performed in 1977 and 1978. [FN22]

FN22. J.A. at 59-62.

(3) Affidavits describing the qualifications of plaintiffs' counsel in military law and FOIA. [FN23]

FN23. Addlestone and Stichman Affidavits, reprinted in J.A. at 46-56.

(4) Copies of two 1977 settlements of FOIA cases (not brought by counsel in this action) in which the government ***1332 **107** agreed to hourly rates ranging from $40 to $90 per hour. [FN24]

FN24. J.A. at 71-81.

In support of the claim for $25.00 per hour for the work of a third-year law student, applicant cited Bachman v. Pertschuk, Civ. No. 76-0079 (D.D.C.1979), appeal pending, No. 81-2130 (D.C.Cir.), which noted that $20 and $22.50 per hour had been accepted by the government as appropriate for work by paralegals. [FN25]

FN25. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Attorneys' Fees and Other Litigation Costs, at 18-19 (November 7, 1980).

The government objected to the hourly rates requested and proposed that $60 per hour was the appropriate rate. In the face of these conflicting and poorly documented contentions the District Court stated:

While the court finds that plaintiff's request is excessive, it also finds the government's rate to be too low. Accordingly, the Court adopts the same rates that it awarded in a recent Title VII case, Williams v. Civiletti, No. 74-0186 (D.C.Cir. (sic) Dec. 8, 1980). There this Court awarded an hourly rate of $85.00 an hour for the attorneys of similar experience and $20.00 an hour for the law clerks.[FN26]

FN26. Order (March 10, 1981) reprinted in J.A. at 16.

[28] We hold that appellees failed to provide adequate factual support for the hourly rates claimed and that the District Court lacked an adequate record to fix this lodestar rate. The need for additional data is amply demonstrated by the District Court's apparent need to rely on the rate it awarded in an unrelated Title VII case in order to set the hourly rate in this FOIA case. Appellees' conclusory "information and belief" affidavits are of no evidentiary value to the District Court in setting a proper rate. Evidence of widely disparate rates awarded in three other cases, all of which were settled by the government in advance of this Circuit's adoption of the "market-value" approach to fee awards in Copeland III, without more, provides an inadequate record for a reasoned determination of the prevailing community rate. On remand, both parties should be provided further opportunity to submit information on the appropriate billing rate.

With respect to hours claimed, each lawyer for whom fees were sought filed a detailed affidavit listing specific activities (e.g., "Research and drafting of FOIA part of complaint; Court appearance on plaintiffs' motion for a preliminary injunction") and the number of hours expended on each.[FN27] In addition, the affidavit of one counsel indicated that 24 hours claimed for work by a paralegal was spent on researching and assisting in the drafting of a motion for a preliminary injunction.[FN28] These submissions were entirely adequate to permit the District Court to determine whether fees should be awarded for all of the hours claimed and the government justifiably does not challenge the adequacy of the submissions on appeal.

FN27. Addlestone and Stichman Affidavits, reprinted in J.A. at 50-51 & 55-56.

FN28. Stichman Affidavit, reprinted in J.A. at 56.

[29] However, appellants contend that the District Court erred in awarding fees for certain hours spent on particular aspects of appellees' FOIA claims that were ultimately rejected by the District Court. Specifically, appellants argue that any time expended following the filing of their opposition to appellees' motion for a preliminary injunction was wasted effort since appellants conceded most of the contested issues in their opposition papers. The District Court rejected this contention, noting that appellees' continued efforts in subsequent settlement negotiations led to further concessions by the government resulting in dismissal of the action by stipulation.[FN29] We discern no abuse of discretion in the District Court's determination not to disallow the hours in dispute. Although "no compensation should be given for hours spent litigating issues upon which plaintiff did not ultimately*1333 **108 prevail," Copeland III, 641 F.2d at 902, this does not mean that the District Court (and still less this Court) must engage in a minute examination of each theory or claim advanced and what results it did or did not produce. See Copeland III, 641 F.2d at 892 n. 18; Lamphere v. Brown Univ., 610 F.2d 46, 47 (1st Cir. 1979).

FN29. Order (March 10, 1981), reprinted in J.A. at 16.

Appellants also challenge the award of a ten percent multiplier. A 25 percent multiplier was requested based on the contingent nature of the suit. Attached to the fee application was an affidavit prepared by the president of the appellee organization stating that it had agreed with counsel that it would

pay no fees "except for the possibility of a court award of attorneys' fees and other litigation costs." [FN30]

> FN30. Affidavit of William Elmore, reprinted in J.A. at 57.

After correctly noting that the burden was on the applicant to justify an adjustment of the lodestar the District Court simply stated:

> The factors to be considered in determining an appropriate multiplier include, inter alia, the contingent nature of success, the delay in receipt of payment, the quality of representation, etc. Accordingly, upon consideration of the entire record herein, the Court finds that a multiplier of 10% to be fair and reasonable.[FN31]

> FN31. Order (March 10, 1981), reprinted in J.A. at 17.

[30][31] The government argues that the District Court's generalized articulation of its reasons is contrary to this Court's admonition that "district court judges ... state their reasons as clearly as possible." Copeland III, 614 F.2d at 893. We agree. The government further argues that to the extent the multiplier is intended to reflect the contingent nature of the suit the award was improper since the billing rate used in calculating the lodestar already included an allowance for the contingency that the suit would not be a success. The record provides no sure evidence on this issue either way. The Court on remand should reconsider its award of a 10 percent multiplier based on a more complete record. [FN32]

> FN32. The government also challenges the award of a contingency for risk because appellees acknowledged in their application for fees "that there was a relatively small risk that this lawsuit would be unsuccessful." Plaintiffs' Motion for Award of Reasonable Attorneys' Fees and Other Litigation Costs, at 20 (filed November 7, 1980). We find no abuse of discretion in the award of a small contingency where there was at least some risk of failure. See Pete v. UMW Welfare & Retirement Fund, 517 F.2d 1275, 1290 (D.C.Cir.1975) (en banc).

While appellants sought discovery without indicating their precise interests, under the circumstances of this case proper discovery consistent with this opinion should be allowed as to the issues remanded.

No. 81-1791-Mark Green, et al. v. Department of Commerce

This FOIA case was finally resolved on the merits after lengthy proceedings at the trial and appellate levels by a settlement agreement pursuant to which the Department of Commerce released a large number of boycott compliance reports submitted to the Department under the Export Administration Act, 50 U.S.C.App. s 2401 et seq. (1976). Because the parties were unable to agree that appellees were prevailing parties within the meaning of 5 U.S.C. s 552(a)(4)(E) and, if so, the size of the fee to which they were entitled, the appellees filed an application for an award of attorneys' fees with the District Court. The District Court determined that appellees were entitled to an award of $19,910.00, plus costs. The Court determined that the hours and rates proposed by appellees (ranging from $45 to $95 an hour for different attorneys) were reasonable and that a ten percent multiplier award was appropriate. This fee award provided compensation for work performed at both the trial and appellate levels.

Appellant argues that the District Court erred in three respects. First, it contends that insufficient evidence was presented as to the prevailing community rate for FOIA work and that the Court therefore erred in accepting the hourly rates proposed by appellees. Next, it is argued that the District *1334 **109 Court erred in accepting all of the hours claimed by appellees, particularly the time spent preparing an amicus brief in another

case raising related issues. Finally, appellant objects to the District Court denial of its specific discovery requests and an evidentiary hearing both of which it claims were appropriate in light of the inadequate record support provided for hours and rates claimed.

Appellees provided the following in support of their claim that hourly billing rates ranging from $45.00 to $95.00 an hour were reasonable, depending on the experience and responsibilities of the attorney involved:

(1) An affidavit prepared by appellees' lead counsel simply stating:

> I am informed and believe that law firms in Washington, D. C. bill in the range of $100-$200 per hour for partners and in the range of $40-$90 per hour for associates. [FN33]

FN33. Affidavit of David C. Vladeck, reprinted in J.A. at 37.

(2) Citations to numerous recent FOIA or Privacy Act cases in the District of Columbia in which hourly rates allowed or the total fee awarded were alleged to be comparable to the rates and total amount sought in this case.[FN34]

FN34. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Attorneys' Fees, reprinted in J.A. at 29-30.

(3) Copies of stipulations in two FOIA cases settled in 1977 in which the government agreed to rates ranging from $40 to $90 per hour and from $45 to $85 an hour. (One attorney seeking fees in this action was counsel in those actions.) [FN35]

FN35. J.A. at 47-57.

(4) Affidavits describing the training and professional accomplishments of counsel.[FN36]

FN36. Vladeck Affidavit, reprinted in J.A. at 34-41.

The Court awarded without any discussion or analysis fees at the hourly rates requested.

[32] Essentially for the reasons stated in our discussion of the hourly rates allowed in National Association of Concerned Veterans, supra, we find that this evidence of the prevailing rate was insufficient to support the fees claimed. While appellees in this case produced a much more comprehensive listing of recent statutory fee cases in this Circuit, we note that no indication of the actual rates awarded in those cases was provided. A mere listing of unreported opinions in which "comparable" rates were allegedly allowed is hardly of assistance to the District Court in determining the prevailing community rate.

The government also challenges the award of all 292 hours claimed on the ground that the documentation of hours expended provided by appellees was too summary. Appellees divided the litigation into four major phases-pretrial litigation, trial phase, Court of Appeals, and remand-and then indicated how many hours individual attorneys had expended during each phase of the litigation. An affidavit prepared by one of the lead counsel supplemented this information by listing the specific work performed by each attorney during each phase of the litigation (e.g., "drafted post-trial motion; drafted interrogatories").[FN37] Although the applicants state by affidavit that they exercised billing judgment in calculating the number of hours expended on the case there is no indication of how many hours were excluded. In addition to challenging the general sufficiency of these submissions appellant specifically objects to the award of any fees for time spent preparing an amicus brief in a related case; the number of hours involved for this undertaking is not indicated in the fee application.

FN37. Vladeck Affidavit, reprinted in J.A. at 38-41.

[33][34] Specific discovery was requested below and in the circumstances of this case it should have been permitted in some respects to test the accuracy of the submissions. No time charges were provided to back up the summary and it appeared at ***1335 **110** oral argument of the appeal that appellees have no systematic methods for recording time and may not be in a position to provide meaningful records when requested. Once a more complete record has been developed the District Court may, among other things, wish to consider the precise number of hours excluded as a result of the applicants' exercise of "billing judgment" in determining the reasonableness of the hours as claimed. In addition, the District Court should reconsider the reasonableness of the time spent on the amicus brief. Compensable time should not be limited to hours expended within the four corners of the litigation. Cf. Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 at 767 (7th Cir. 1982) (awarding fees for time expended in attempts to have defendant debarred from federal contract to force resolution of a Title VII action). However, there must be a clear showing that the time was expended in pursuit of a successful resolution of the case in which fees are being claimed.

Appellees requested a 25 percent multiplier based on the following considerations: (1) quality of representation; (2) contingent nature of the suit; (3) delay of up to three years in receipt of payment; and (4) the case went to trial on the merits and required an appeal before it was resolved. The Court determined that a ten percent multiplier was appropriate.

[35] We begin by noting that several of the considerations mentioned above could not properly support a multiplier award or lacked adequate support in the record. We are aware of no authority that supports an adjustment of the lodestar because the case involved a trial and an appeal; given that all hours expended were considered in calculating the lodestar no further adjustment was necessary to reflect the particular nature of the work involved. In addition, no showing was made in the fee application that counsel had performed unusually well taking into account the hourly rate used in calculating the lodestar and the District Court made no finding to this effect. Finally, while the District Court might well have concluded from the non-profit character of one of the plaintiff organizations that counsel would receive no fee, no specific evidence to this effect was provided.

The element of delay would ordinarily be sufficient to support a multiplier award in some percentage. However, the government correctly argues that the District Court's generalized articulation of its reasons, which is virtually identical to the language quoted above from the fee award in National Association of Concerned Veterans, supra, decided by the same Judge, fails to satisfy Copeland III. Since the case must be remanded for other reasons, the District Court should take the opportunity on remand to make factual findings supporting a multiplier under Copeland III standards if it determines on remand that any multiplier is still appropriate.

No. 81-1965-Beverly L. B. Parker v. Drew Lewis

This Title VII action for alleged sex discrimination in the Federal Housing Administration was settled and appellee received a retroactive promotion and back pay in the sum of $4,254.76. After the parties had failed to reach agreement on an appropriate fee award, appellee filed a motion for fees and costs which was opposed by the government. The District Court accepted all of the hours claimed in support of the award as well as the hourly rates proposed for a total fee award of $17,341.74. The District Court declined to award a multiplier on the ground that the hourly rates requested already included an allowance for the contingent nature of the suit.

Appellant argues that the hourly rates proposed by appellee and accepted by the District Court were improperly developed and exceeded the prevailing rate in the community. Appellant also challenges the District Court's acceptance of all of the hours claimed, especially the time spent by attorneys for

plaintiff conferring among themselves about the case. Finally, appellant asserts that the District Court erred in *1336 **111 refusing to permit the government to take discovery as to the appropriateness of the hours and rates claimed and in not conducting an evidentiary hearing.

In support of the billing rates claimed the applicant provided the following information:

(1) In two Title VII cases against the government settled in 1977 the government agreed to pay fees to one of the lead counsel in this action computed at the rate of $75 per hour. To calculate appropriate billing rates for work performed in subsequent years in connection with this case, counsel adjusted the 1977 hourly rate to reflect increases in the cost of living each year and by adding $5.00 an hour for each year since 1977 to reflect counsel's increasing experience. The formula generated hourly rates of $102, $123 and $138 per hour for the years 1979, 1980 and 1981, respectively.[FN38]

FN38. Memorandum of Points and Authorities in Support of Plaintiff's Motion for Attorneys' Fees and Costs, reprinted in J.A. at 14-16.

(2) The following statement in an affidavit prepared by one of the lead counsel:

We have had clients pay us for work done in 1980 at the rate of $150.00 per hour, a rate we feel is reasonable given our level of experience and expertise in the area of employment discrimination.[FN39]

FN39. Affidavit of Valerie V. Ambler, reprinted in J.A. at 32.

(3) Affidavits describing counsels' professional background.[FN40]

FN40. Affidavits of Elizabeth L. Newman, Valerie V. Ambler, and Alan H. Sandals, reprinted in J.A. at 23-34.

(4) An affidavit by a former sole practitioner specializing in Title VII work arguing that fee awards are customarily too low to support a legal practice. [FN41]

FN41. Affidavit of Richard T. Seymour, reprinted in J.A. at 57-62.

(5) References to two Title VII actions, one of which was brought in the District of Columbia, that were settled and for which one counsel in this action received compensation at the rate of $101.25 an hour for work done in 1977, $106 an hour for 1978 work and $107 an hour for 1979 work.[FN42]

FN42. Ambler Affidavit, reprinted in J.A. at 31.

(6) A listing of 12 recent cases in which the hourly rates ranged from $35 an hour to $200 an hour. Only one-half of these were Title VII or other types of discrimination actions and nine were brought in Circuits other than the District of Columbia.[FN43]

FN43. J.A. at 56.

[36]On appeal the government attacks the calculation of current billing rates by adjusting 1977 rates for inflation and increasing experience as "artificial" as well as contrary to the teaching of Copeland III. At oral argument it appeared that neither of the lead counsel had ever litigated a case at the time of the District Court award, a fact heavily relied on by the government in arguing that the rates are excessive. In addition, the government argues that there was no evidence before the District Court supporting the billing rates assigned to the associates who worked on this case.

[36] The Court finds that these submissions were insufficient to permit the District Court to perform the calculations mandated by Copeland III. As

private counsel with fee-paying clients, the applicants should have provided the Court with more informative data about the value of their services in the market. Furthermore, the method of calculating present fees based on adjustments for inflation and experience is contrary to the teaching of Copeland III. The relevant datum is the prevailing community rate for attorneys of similar qualifications performing similar work, not what rate would be desirable in order to keep ***1337 **112** pace with inflation or to reward increasing legal expertise.

[37] Appellant does not suggest that the record was inadequate to permit the District Court effectively to scrutinize the hours claimed. Attached to the fee application were detailed schedules for each attorney who worked on the case listing specific tasks (e.g., "drafting motion for extension of time; Legal research-pro se attorneys' fees") and the hours expended on each. [FN44] However, appellant challenges the allowance of hours spent by appellee's counsel conferring together about the case. It was well within the District Court's discretion to allow this time on the theory that attorneys must spend at least some of their time conferring with colleagues, particularly their subordinates, to ensure that a case is managed in an effective as well as efficient manner.

FN44. J.A. at 35-42.

In its opposition to the motion for award of attorneys' fees the government requested an opportunity to take discovery. Since the case must be remanded for reexamination of the hourly rate, the government should be permitted on remand to file sharply focused discovery demands relating to this issue.

[38] Finally, as to the hearing issue, in Nos. 81-1965 and 81-1364 the government requested a hearing in its oppositions to the motions for award of attorneys' fees.[FN45] Since discovery was denied in each case the Court cannot determine from the present record whether a hearing may have been needed. This can only be determined after further proceedings in the courts below which will require development of an adequate record based on the procedures outlined above. In 81-1791, no hearing was requested and it was therefore waived. Copeland III, 641 F.2d at 905. However, since this case must be remanded for further proceedings consistent with this opinion the District Court may wish to consider the need for a hearing based on a more complete record.

FN45. In No. 81-1965, see J.A. at 76. In No. 81-1364, see Memorandum of Points and Authorities in Support of Defendants' Opposition to Plaintiffs' Motion for Award of Reasonable Attorneys' Fees and Other Litigation Costs, at 2 (December 15, 1981).

CONCLUSION

For the reasons stated, the fee award judgments from which the captioned appeals arise are vacated and the cases are remanded for further proceedings consistent with this opinion.

TAMM, Circuit Judge, concurring:

I concur completely in the excellent opinion for the court. It provides sorely needed guidance to applicants for attorneys' fees, opposing parties, and district judges alike. I write only in an attempt to rectify what I perceive to be a misapprehension by the government appellants in these cases of an opposing party's proper role in fee application proceedings.

Attorneys' fees applications are, of course, closely related to the merits proceedings from which they arise. At the same time, however, they are more akin to completely separate civil suits. It is the mixed nature of such proceedings, I believe, that gives rise to much of the procedural floundering apparent in the cases at bar. Counsel should not lose sight of the fact that the most elementary principles of civil procedure are nevertheless applic- able.

The burden of proof is, of course, on the ap-

plicant and remains with the applicant throughout the proceedings. The initial burden of proceeding is also on the applicant. The applicant meets this burden by submitting an application accompanied by the sufficiently detailed supporting documentation contemplated by Copeland and clarified by our opinion today. The burden of proceeding then shifts to the party opposing the fee award, who must submit ***1338 **113** facts and detailed affidavits to show why the applicant's request should be reduced or denied. Just as the applicant cannot submit a conclusory application, an opposing party does not meet his burden merely by asserting broad challenges to the application. It is not enough for an opposing party simply to state, for example, that the hours claimed are excessive and the rates submitted too high.

Neither broadly based, ill-aimed attacks, nor nit-picking claims by the Government should be countenanced. District courts should examine with care the "issues" raised by opposing parties. If they appear to be more in the nature of a blunderbuss attack than a precise and well-founded challenge, the Government has failed to carry its burden, and, assuming that plaintiff has met his threshold burden, the fees requested by plaintiff should be awarded.

The Government relies heavily in all three of these cases on the district court's failure to permit discovery or to grant a hearing on the issues raised. Until now, the proper procedures for seeking discovery were indeed unclear. Our opinion seeks to clarify them. Nevertheless, the actions of the Government, I believe, merit some comment.

Following the filing of the fee application in Parker, the Government requested and was granted three extensions of time to file its response. No attempt to conduct discovery was made; there was no request for production of the time sheets or records. The Government's request for discovery and a hearing was contained in the final paragraphs of the 16-page opposition.

In Green, the Government apparently did not feel that prior court permission to conduct discovery was required. Interrogatories and requests for production of documents were sent to plaintiff. The far-ranging and inappropriate nature of these requests caused the district court to enter, at the applicant's request, a protective order. Although the Government, in its opposition to the fee application, specifically reserved the right to conduct further discovery and to request a hearing,[FN*] no request for a hearing or for permission to conduct discovery was ever filed.

> FN* Defendant's Opposition to Plaintiffs' Motion for Award of Reasonable Attorneys' Fees and Other Litigation Costs, at 3 n.3, Green v. Department of Commerce, Civ. No. 77-363 (D.D.C. May 14, 1981).

In National Association of Concerned Veterans, the Government sought and received three extensions of time in which to oppose the fee application. No mention of discovery was made in these requests, nor was discovery attempted. Again, the request for discovery and for a hearing were contained in the opposition papers.

The Government appears confused concerning the procedures it must follow in order to conduct discovery or request a hearing; thus, I think it important to spell out step-by-step the mechanics. Should circumstances present a genuine need for further exploration, the opposing party must file with the district court a formal request for discovery. The request must state the specific issues on which discovery is needed, point to the particular aspects of the fee application raising the issues, and contain a precise statement of what the discovery is expected to produce. If a discovery request is denied, the district court should, of course, state its reasons.

Furthermore, I believe it is important to emphasize that, once it has been determined that the plaintiff is in fact entitled to attorneys' fees, there are only a limited number of bases upon which an opposing party may legitimately challenge the reas-

onableness of the fee request. Thus, even fewer issues should warrant discovery.

In much the same vein, any request for a hearing on issues raised, while it may be contained in the opposition, must specify the precise reasons that a hearing is deemed necessary and the specific issues upon which a hearing should be granted. A simple "request for a hearing" is not sufficient.

C.A.D.C., 1982.
National Ass'n of Concerned Veterans v. Secretary of Defense
675 F.2d 1319, 28 Fair Empl.Prac.Cas. (BNA) 1134, 28 Empl. Prac. Dec. P 32,665, 219 U.S.App.D.C. 94

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519 F.Supp. 900, 29 Fair Empl.Prac.Cas. (BNA) 1083
(Cite as: 519 F.Supp. 900)

H

United States District Court, N.D. Illinois, Eastern Division.
Fred VOCCA, Plaintiff,
v.
PLAYBOY HOTEL OF CHICAGO, INC., Defendant.

No. 79 C 1811.
Aug. 17, 1981.

Plaintiff moved for an award of costs and attorney fees in age discrimination suit. The District Court, Leighton, J., denied request in its entirety.

Motion denied.

West Headnotes

Civil Rights 78 ⟹1587

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1585 Attorney Fees
78k1587 k. Proceedings, Grounds, and Objections in General. Most Cited Cases
(Formerly 78k411, 78k46(22), 78k46)

A request for award of attorney fees in age discrimination suit was denied in its entirety in light of fact that although it had become evident that plaintiff's lost wages would have amounted to no more than $8,200, plaintiff's counsel persisted in maintaining that plaintiff's back wages would come to over $57,000, counsel never sought to inspect any of documents claimed to have been credible, took no depositions, and failed to appear and produce plaintiff for noticed deposition, and some of time allegedly billed involved plainly clerical, rather than legal, work. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

***900** Anthony Intini, III, Chicago, Ill., for plaintiff.

***901** Herbert L. Borovsky and Howard L. Mocerf, Chicago, Ill., for defendant.

MEMORANDUM

LEIGHTON, District Judge.

This action is before the court on plaintiff's motion for an award of costs and attorneys' fees. Plaintiff's complaint had alleged that he had been discharged from employment by Playboy because of his age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. s 621 et seq. A settlement was eventually agreed to, the terms of which are irrelevant for the purposes of the motion now before the court. Playboy claims that it agreed to settle solely because it wished to avoid the cost of continued litigation, and opposes any award whatsoever.

In support of his motion for costs and fees, plaintiff's counsel merely submitted a schedule listing dates, short descriptions, and number of hours spent. Claiming that he spent a total of 99.75 hours since 1978 at $100.00/hour, and listing enumerated costs in the aggregate amount of $600.75, plaintiff's counsel requests an award of $10,575.75. No supporting memorandum was filed. This court set the motion for costs and fees on a briefing schedule, and Playboy's counsel filed a detailed memorandum opposing any award, along with supporting affidavits. Plaintiff's counsel was given ample opportunity to reply, and failed to do so by May 18, 1981, the date set by the briefing schedule. On May 29, 1981, after the case was called for ruling, plaintiff's counsel's office obtained an extension of time within which to file a reply, and did then respond to Playboy's opposition. For the following reasons, plaintiff's request for fees is denied in its entirety, and certain costs are allowed as set forth below.

Preliminarily, this court finds noteworthy the analysis set forth in Boe v. Colello, 447 F.Supp. 607, 610 (S.D.N.Y.1978):

> This Court's experience, both at the bench and bar over extended years, qualifies it to estimate the time reasonably required by plaintiffs' claims in terms of research, analysis and drafting of various documents. Moreover, the Court's own research, study and analysis of the respective contentions of the parties further afford some yardstick by which to measure plaintiffs' attorney's allegations of the time factor. Any expenditure of time beyond that which is reasonably required suggests either inexperience and devotion of more time than warranted to fairly and properly present claims or, alternatively, that the attorneys, however experienced, engaged in dilettantism; a losing side is not required to pay for such indulgences.

Unlike Boe, the defendant in this case settled. Accordingly, the analysis used there is even more persuasive. Moreover, this court also deems noteworthy the case of Brown v. Stackler, 612 F.2d 1057, 1059 (7th Cir. 1980), where the court of appeals affirmed the district court's refusal to award fees, noting that the case was plain and simple, that the number of hours allegedly billed was manifestly unreasonable, and that claimants might otherwise be encouraged to request outrageous fees knowing that the only unfavorable consequence would be reduction to what should have originally been asked for.

In denying the request for fees in toto, this court has taken into consideration the following. First, it soon became evident that plaintiff's lost wages would amount to no more than $8,200. Nevertheless, counsel persisted in maintaining that plaintiff's back wages would come to $57,934.51. Second, Playboy offered to settle for $11,000 in August of 1980, and plaintiff's counsel refused, citing Playboy's ability to pay more, and demanding further discovery. However, he never sought to inspect any of the documents he claimed to be so critical, and took no depositions. He failed to appear and produce plaintiff for a noticed deposition, and Playboy was required to obtain an order compelling plaintiff to attend. When the due date for final pretrial order was imminent, plaintiff's counsel then agreed to settle the back wages claim for just $1,538.70 more than Playboy had offered some months earlier, provided that ***902** Playboy also pay him $7,500 in fees and costs. Playboy refused to pay fees or costs, and the parties then settled for back wages, leaving the issue of fees and costs for this court's decision.

Third, plaintiff's counsel claims to charge an hourly rate of $100, without regard to the fact that younger, less experienced lawyers have appeared from his office, without regard to the fact that this rate has purportedly been charged by him since 1978, and without regard to the fact that some of the time allegedly billed involved plainly clerical, rather than legal, work. In addition, at least 40 of the hours claimed involved time allegedly spent before this complaint was filed. For these and other reasons plainly evident in the record before this court, the request for fees must be denied in its entirety.

However, this court finds that certain of the enumerated costs allegedly incurred are valid. Thus, the cost of filing the complaint and the U. S. Marshal's summons fee are granted. The court also allows the costs of duplicating various materials, but at the rate of 10¢ per sheet, rather than 25¢ as requested by plaintiff. Finally, the cost of obtaining the transcript of plaintiff's deposition should also be allowed. This court's calculations reveal that: the filing of the complaint and service of summons came to $19; 874 copies were duplicated at 10¢ per sheet; and, the cost of obtaining the deposition transcript was $342, for a total of $448.40 in awardable costs. For these reasons, the request for an award of fees is denied in its entirety, and $448.40 is awarded in costs.

D.C.Ill., 1981.
Vocca v. Playboy Hotel of Chicago, Inc.
519 F.Supp. 900, 29 Fair Empl.Prac.Cas. (BNA) 1083

519 F.Supp. 900, 29 Fair Empl.Prac.Cas. (BNA) 1083
(Cite as: 519 F.Supp. 900)

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(Cite as: 2010 WL 2303273 (E.D.Cal.))

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
E.D. California.
General Charles "Chuck" YEAGER, (Ret.), and General Chuck Yeager Foundation, Plaintiffs,
v.
Connie Bowlin, Ed BOWLIN, David McFarland, Aviation Autographs, a non-incorporated Georgia business entity, Bowlin & Associates, Inc., a Georgia corporation, International Association of Eagles, Inc., an Alabama corporation, Spalding Services, Inc., and Does 1 through 100, inclusive, Defendants.

No. CIV. 2:08–102 WBS JFM.
June 7, 2010.

MEMORANDUM AND ORDER RE: MOTION FOR ATTORNEY'S FEES AND COSTS

WILLIAM B. SHUBB, District Judge.

***1** Having prevailed on their motion for summary judgment (*See* Docket No. 135), defendants Connie and Ed Bowlin, Aviation Autographs, and Bowlin and Associates, Inc. now move for an award of attorney's fees and costs pursuant to California Civil Code section 3344(a) and section 35(a) of the Lanham Act, 15 U.S.C. 1117(a).

I. *Factual and Procedural Background*

Plaintiffs General Charles Yeager and the General Chuck Yeager Foundation filed suit against defendants on January 14, 2008, for violations of California Civil Code section 3344 (statutory right of publicity); the Lanham Act, 15 U.S.C. §§ 1051 – 1129; California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.Code §§ 17200 – 17210; and the California False Advertising Act, *id.* § 17500; as well as common law claims for breach of right to privacy, fraud, breach of contract, unjust enrichment, accounting, and equitable rescission. (Docket No. 1.) Defendants filed a motion to dismiss the original complaint, which was granted with leave to amend. (Docket No. 17). Plaintiffs then filed a First and Second Amended Complaint.

On November 16, 2009, defendants Connie and Ed Bowlin, Aviation Autographs, and Bowlin and Associates, Inc. moved for summary judgment. (Docket No. 103.) The court granted that motion in its entirety and entered judgment in favor of defendants. (Docket No. 135.) Defendants filed a motion to recover their attorney's fees and costs on February 2, 2010. (Docket No. 141.) In response to pervasive block billing in defendants' initial billing statement, on April 23, 2010, the court ordered defendants to submit an amended motion for attorney's fees that did not use block billing. (Docket No. 162.) Defendants submitted an amended motion for attorney's fees and amended billing statement that allocated time for each task performed on May 3, 2010. (Docket No. 163.)

II. *Discussion*

Jurisdiction in this action is based on 28 U.S.C. § 1331 (federal question jurisdiction). "In an action where a district court is exercising its subject matter jurisdiction over a state law claim, so long as 'state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.' " *MRO Commc'ns, Inc. v. AT & T Corp.*, 197 F.3d 1276, 1281 (9th Cir.1999) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n. 31, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)). Thus, when a federal court has federal question jurisdiction and exercises supplemental jurisdiction over a state law claim, the court may award attorney's fees under the applicable statute. *See MRO Commc'ns,* 197 F.3d at 1281–83.

Defendants request attorney's fees and costs under both California Civil Code section 3344(a) and section 35(a) of the Lanham Act. California Civil Code section 3344(a) provides for a mandatory award of attorney's fees and costs to the prevailing party on a section 3344 statutory right of publicity claim. Cal. Civ.Code § 3344

(a) ("The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."); *Bonner v. Fuji Photo Film,* No. Civ. 06–4372 CRB, 2008 WL 410260, at *2 (N.D.Cal. Feb.12, 2008) (citing *Kirby v. Sega of Am., Inc.,* 144 Cal.App.4th 47, 62, 50 Cal.Rptr.3d 607 (2006)).

***2** "[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate." *PLCM Group v. Drexler,* 22 Cal.4th 1084, 1095, 95 Cal.Rptr.2d 198, 997 P.2d 511 (2000). "The reasonable hourly rate is that prevailing in the community for similar work." *Id.* (citing *Margolin v. Reg'l Planning Comm'n,* 134 Cal.App.3d 999, 1004, 185 Cal.Rptr. 145 (1982)). The lodestar may then by adjusted upward or downward "by the court based on factors including ... (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award." *Ketchum v. Moses,* 24 Cal.4th 1122, 1132, 104 Cal.Rptr.2d 377, 17 P.3d 735 (2001). The purpose of adjusting the lodestar is to fix the fee for the action in question at fair market value. *Id.*

A similar approach is applied under federal law. The court first calculates the lodestar by taking the number of hours reasonably expended by the litigation and multiplying it by a reasonable hourly rate. *Fisher v. SJB–P.D. Inc.,* 214 F.3d 1115, 1119 (9th Cir.2000) (citing *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). The court may then adjust the lodestar based on an evaluation of the factors articulated in *Kerr v. Screen Extras Guild, Inc.,* 536 F.2d 67 (9th Cir.1975) that are not subsumed under the lodestar calculation.[FN1] *Id.*

> FN1. The factors articulated by the Ninth Circuit in *Kerr* are: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill required to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Kerr,* 526 F.2d at 70.

Federal law, unlike California law, does not allow for contingency multipliers. *Compare City of Burlington v. Dague,* 505 U.S. 557, 567, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) *with Serano v. Priest,* 20 Cal.3d 25, 48–49, 141 Cal.Rptr. 315, 569 P.2d 1303 (1977). As a contingency multiplier is not being asked for in this case, the court's analysis of the reasonableness of defendants' attorneys' fee award under either law will largely be identical. Given defendants' emphasis on section 3344(a) and its mandatory nature, the court will begin its analysis of defendants' fee award under California law.

A. *Lodestar Calculation*

Defendants propose a lodestar figure of $296,673.50. This amount accounts for the hours principally expended by Todd M. Noonan, a partner of the law firm of Stevens, O'Connell & Jacobs LLP ("Stevens O'Connell"), although certain fees generated by other partners, associates, and paralegals are also included. (*See* Noonan Decl. (Docket No. 145) ¶¶ 7, 14–15; Am. Mot. Attorney's Fees (Docket No. 163) at 3.) This amount does not include approximately $33,745 worth of charges written off by Stevens O'Connell in their bills to defendants. (*Id.* ¶ 14.) The figure also includes an additional $1,200 for services provided by defendants' Georgia-based counsel, Donald Taliaferro and $12,440 in attorney's fees incurred in connection with the Bill of Costs and defendant's reply brief to plaintiffs' opposition to the motion. (*Id.* ¶ 58; Am. Mot. Attorney's Fees at 3.)

Plaintiffs object to defendants' request for attorneys' fees and costs on numerous grounds. Plaintiffs primarily contend that: (1) defendants' amended billing statements should be rejected because they do not have sufficient

evidence to support them, (2) Stevens O'Connell's billing rates were unreasonable, (3) much of the work done by Noonan could have done by associates, paralegals, or secretaries at a cheaper cost, and (4) defendants should be denied compensation and have their lodestar amount reduced for billing related to attacks on the Yeagers' character.

1. *Adequacy of Amended Billing Statements*

*3 Plaintiffs argue that defendants' amended billing statements do not meet defendants' burden of proof because the amended billing statements were not made contemporaneously and lack adequate foundation as to their validity. Although the Ninth Circuit has "expressed a 'preference' for contemporaneous records," it has "never held that they are absolutely necessary." *Fischer v. SJB–P.D., Inc.*, 214 F.3d 1115, 1121 (9th Cir.2000); *see also United States v. $12,248 U.S. Currency*, 957 F.2d 1513, 1521 (9th Cir.1991); *United States v. City & County of San Francisco*, 748 F.Supp. 1416, 1420 (N.D.Cal.1990) (noting that the use of reconstructed billing records "is an established practice in this circuit"). "Basing the attorneys' fee award in part on reconstructed records developed by reference to litigation files and other records is not an abuse of discretion." *Davis v. City & County of Sacramento*, 976 F.2d 1536, 1542 (9th Cir.1992) (citing *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1473 (9th Cir.1983)) *rev'd in part on other grounds by Davis v. City & County of Sacramento*, 984 F.2d 345 (9th Cir.1993).

Defendants' amended billing statements, which list the amount of time expended on each identified task instead of block billing for all time for a given day, are sufficiently reliable.[FN2] Noonan, Stevens O'Connell associate Daniel J. Croxall, and paralegal Lucy Kellogg created the amended billing statements by reviewing the original billing statements and then using their personal recollections, customs and practices, and review of the documents and correspondence created on each day to reconstruct the amount of time spent on each task. (Am. Noonan Decl. (Docket No. 166) ¶¶ 3–6.; Croxall Decl. (Docket No. 164) ¶¶ 3, 6; Kellogg Decl. (Docket No. 165) ¶¶ 3, 5–6.) Unlike cases where a party must reconstruct its billing records from scratch, defendants' counsel had the assistance of contemporaneously created block billed records when creating the amended billing statements, thereby increasing the reliability of the reconstructed records. The declarations submitted by defendants' counsel indicate that the amended billing statements were created with reference to defendants' litigation file, the previous bills, and with information within counsel's personal knowledge. In light of the foregoing facts, the court finds that the amended billing statements are sufficiently reliable and adequate. *See Davis*, 976 F.2d at 1542; *Fleming v. Coverstone*, No. 08cv355 WQH (NLS), 2009 WL 764940, at *4 (S.D.Cal. Mar. 18, 2009).

> FN2. Plaintiffs object to Noonan, Croxall, and Kellogg's declarations, as well as the amended billing statements themselves. Noonan, Croxall, and Kellogg's declarations are all based on their personal knowledge, and describe the methodology used to create the amended billing statements. Noonan also states that he has personal knowledge that the statements are reliable. Noonan, Croxall, and Kellogg utilized documents which were either available to plaintiffs as part of defendants' legal file or privileged to construct the amended billing statements. These documents are properly submitted in support of defendants' fee request. *See Fischer*, 214 F.3d at 1121 (noting that fee requests based on reconstructed billing statements can be proper). Accordingly, plaintiffs' evidentiary objections on the grounds of lack of foundation, lack of personal knowledge, hearsay, lack of access to documents refreshing recollection, and best evidence are overruled.

2. *Reasonable Rate*

A reasonable rate is typically based upon the prevailing market rate in the community for "similar work performed by attorneys of comparable skill, experience, and reputation." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir.1986); *see also Blum v. Stenson*, 465 U.S. 886, 895–96 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) ("[T]he burden is on the fee applic-

ant to produce satisfactory evidence ... that the requested rates are in line with those prevailing in the community."); *Drexler,* 22 Cal.4th at 1095, 95 Cal.Rptr.2d 198, 997 P.2d 511. The relevant community is generally the forum in which the court sits. *Barjon v. Dalton,* 132 F.3d 496, 500 (9th Cir.1997).

*4 Noonan seeks an hourly rate of $400 per hour for his work and the work of fellow partner Brad Benbrook, $305 per hour for associate Dan Croxall's work, and $135 per hour and $155 per hour for the work of paralegals Lucy Kellogg and Greg Nelson, respectively. (*Id.*) In support of his requested fee rate, Noonan submits the declaration of Glenn W. Peterson, a partner at the firm of Millstone, Peterson & Watts LLP and practicing attorney in Sacramento since the late 1980s. (Peterson Decl. (Docket No. 142) ¶ 2.) Mr. Peterson's practice focuses on complex litigation with a "strong focus on intellectual property, including trademark/copyright infringement and business torts." (*Id.* ¶ 3.) Mr. Peterson declares that "[f]or a complex right of publicity/Lanham Act case such as this in federal court ... a rate of $400 is at the lower end of the market, if not [ ] below market rate" and that "many lawyers in Sacramento would bill $450 to $500 per hour or more for matters such as this." (*Id.* ¶ 4.)

Noonan also submits the declaration of Tory Griffin, a partner of the law firm of Downey Brand LLP in Sacramento whose practice includes intellectual property litigation and complex commercial litigation. (Griffin Decl. (Docket No. 143) ¶ 2.) Mr. Griffin declares that "[t]he hourly rates for partners in [his] firm have been established in light of the prevailing rates in the Sacramento area for attorneys with [Downey Brand LLP's] background and experience ... and general range from $325 to 550 per hour for partner level lawyers." (*Id.* ¶ 3.) Mr. Griffin concludes that in his opinion, for a matter such as this that "was complex, involved a high profile plaintiff, and numerous state and federal claims ... an hourly rate of $400 for a lawyer of Mr. Noonan's background and experience represents a reasonable rate." (*Id.* ¶ 4.)

Noonan lastly submits a declaration from Wesley C.J. Ehlers, a partner at Pillsbury Winthrop Shaw Pittman LLP, who has litigated antitrust, unfair competition, and intellectual property disputes in the Sacramento area. (Ehlers Decl. (Docket No. 144) ¶¶ 2–3.) Mr. Ehlers declares that "[f]or a complex right of publicity/Lanham Act case such as this in federal court ... a rate of $400 is at the lower end of the market, if not below market rate." (*Id.* ¶ 5.) Mr. Ehlers further states that a $400 per hour rate "is below the customary rate that Pillsbury would charge on an hourly basis for an attorney of Mr. Noonan's background and experience for a matter such as this" and that "many lawyers in Sacramento would bill $450 to $500 per hour or more" for this case. (*Id.*)

Plaintiffs argue that the rates proposed for Noonan, Croxall, and the paralegals are unreasonable because they are higher than the rates accepted as the prevailing hourly rate in Sacramento by courts in this district. Plaintiffs note that in many cases, "[j]udges in this district have consistently found $250 per hour to be a reasonable rate for an experienced attorney working in this community." *Belliveau v. Thomson Fin., Inc.,* No. Civ. 2:05–1175 GEB DAD, 2007 WL 1660999, at *4 (E.D.Cal. June 6, 2007); *see also Eiden v. Thrifty Payless Inc.,* 407 F.Supp.2d 1165, 1171 (E.D.Cal.2005) (Americans With Disabilities Act case); *Cummings v. Connell,* 177 F.Supp.2d 1079, 1088–89 (E.D.Cal.2001) (civil rights case), *rev'd on other grounds,* 316 F.3d 886 (9th Cir.2003).

*5 However, "in determining the prevailing market rate a district court abuses its discretion to the extent it relies on cases decided years before the attorneys actually rendered their services." *Camacho v. Bridgeport Fin., Inc.,* 523 F.3d 973, 981 (9th Cir.2008) (citing *Bell v. Clackamas County,* 341 F.3d 858, 869 (9th Cir.2003) (holding it was an abuse of discretion to apply market rates more than two years before the work was performed)). "The district court's function is to award fees that reflect economic conditions in the district; it is not to 'hold the line' at a particular rate ...." *Moreno v. City of Sacramento,* 534 F.3d 1106, 1115 (9th Cir.2008). Accordingly, while the court can consider fees awarded by judges in this district, those fees are by no means dispositive. *See id.*

Moreover, the cases cited by plaintiffs for the proposition that $250 per hour is a reasonable rate for Noonan's work in this action are inapposite. Unlike those cases, which involved relatively simple civil rights or Americans with Disabilities Act claims, litigation of this action required specialized knowledge of the complexities of intellectual property law in a suit involving a high profile plaintiff. Defendants' counsel may accordingly be entitled to higher hourly compensation than attorneys who litigate cases that do not require such special skill or expertise.

The cases cited by plaintiffs also for the most part involved attorneys for prevailing plaintiffs who were entitled by statute to recover their fees from the opposing party, but never expected to collect them from their own clients. *See, e.g., Eiden,* 407 F.Supp.2d at 1165; *Cummings,* 177 F.Supp.2d at 1088–89. In those cases, the attorneys typically have a contingent fee contract in which the client is obligated to pay only if he or she prevails, and then, of course, it is the opposing party rather than the client who pays the fee. In those cases, a plaintiff's attorney cannot represent that the hourly rate proposed to the court is the actual fee that the client would pay. *See White v. GMRI, Inc.,* No. Civ. 04–0620 WBS KJM, 2006 WL 947768, at *2–3 (E.D.Cal. Apr.12, 2006).

In contrast, in a case such as this the hourly rate billed by the attorney is a rate which the client has agreed to pay, and would in fact pay if it did not prevail. It is also a rate which the attorney regularly bills and collects from his other clients for similar work. In cases like this the attorney's representation of the going rate for his services is entitled to greater credibility. Accordingly, defendants' willingness to pay Noonan's $400 hourly rate is a strong indication that his rate was a reasonable market rate for this case. *See Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc.,* 253 F.3d 1332, 1337 (11th Cir.2001).

Defendants have also presented substantial evidence in the form of declarations from experienced litigators in the Sacramento community indicating that partners with comparable levels of experience to Noonan generally charge between $325 and $500 per hour in the Sacramento area for intellectual property disputes and actions under the Lanham Act. (*See* Griffin Decl. ¶ 3; Peterson Decl. ¶ 4; Ehlers Decl. ¶ 5.) The declarations also aver that a case involving a high profile plaintiff, multiple state and federal claims, and the Lanham Act has a higher level of complexity than an average case in the community, which the court agrees is the case. (*See* Griffin Decl. ¶ 3; Peterson Decl. ¶ 4; Ehlers Decl. ¶ 5.)

*6 Although the Peterson and Ehlers declarations do not use the exact phrase "prevailing rate" when describing the rates employed by partners with experience levels comparable to Noonan in Sacramento, both declarations indicate that a $400 per hour rate is at the lower end of the Sacramento market, if not below market for a case similar to this one. (Peterson Decl. ¶ 4; Ehlers Decl. ¶ 5.) Furthermore, the Griffin declaration states that Downey Brand LLP's rate of $325 to $500 per hour for a partner's work is set based on the prevailing rates in Sacramento. Plaintiffs have presented no evidence to the contrary.

In the light of the findings of other courts in this district, the briefs, and the declarations submitted, the court finds that an hourly rate of $400 per hour is an appropriate rate for similar work performed by attorneys of similar experience and skill to Noonan and Benbrook in the Sacramento area.

However, defendants have not provided any evidence to the court to establish what a reasonable rate is for associate attorneys or paralegals in this community. "Judges in this district have repeatedly found that [a] reasonable rate[ ] in this district [is] ... $150 for associates." *Eiden,* 407 F.Supp.2d at 1171; *see also Belliveau,* 2007 WL 1660999, at *4. Additionally, the paralegal rate "favored in this district" is $75 per hour. *Faerfers,* 2008 WL 1970325, at *5 (quoting *Robinson v. Chand,* No. Civ. 2:05–1080 DFL DAD, 2007 WL 1300450, at *2 (E.D.Cal. May 2, 2007)). The court agrees with these conclusions and given that defendants have presented no evidence to the contrary, will limit recovery of associates' fees to a rate of $150 per hour and paralegals' fees to $75 per hour.

Plaintiffs also object to the rates charged for a num-

ber of hours billed by Noonan, arguing that many tasks billed at Noonan's partner rate should have been delegated to an associate, paralegal, or secretary. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." *Hensley,* 461 U.S. at 434. Accordingly, the court should "not approve of '[t]he wasteful use of highly skilled and highly priced talent for matters easily delegable to non-professionals or less experienced associates.' " *MacDougal v. Catalyst Nightclub,* 58 F.Supp.2d 1101, 1105 (N.D.Cal.1999) (citing *Ursic v. Bethlehem Mines,* 719 F.2d 670, 677 (3rd Cir.1983)). However, when looking at appropriate billing rates for various tasks, the court,

> may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests. The difficulty and skill level of the work performed, and the result achieved—not whether it would have been cheaper to delegate the work to other attorneys—must drive the district court's decision.

*7 *Moreno,* 523 F.3d at 1115.

In support of their claim of overbilling, plaintiffs submit a declaration from Gary A. Bresee, a partner of the law firm of Barger & Wollen LLP, who has been involved in litigation for twenty-one years, including litigation and consulting over attorney fee disputes. (*See* Bresee Decl. (Docket No. 157) ¶¶ 1–2.) Mr. Bresee contends that many tasks undertaken by Noonan would normally be undertaken by an associate and reviewed by a partner, and accordingly that Noonan's fees should be reduced to an associate rate for two-thirds of the 57.2 hours expended on this work. (*Id.* ¶¶ 16–20, 22.) Such work includes: personally researching venue and personal jurisdiction issues on the motion to dismiss; researching statute of limitations issues; drafting joint status reports, stipulations to extend time, a motion for sanctions, a stipulated protective order, and a motion to strike; drafting discovery documents such as document requests, requests for admission, and interrogatories; and spending four hours at an off-site document production. (*Id.* ¶¶ 6–8).

The court is skeptical that the firm model imposed by Mr. Bresee would necessarily have saved defendants any money. Noonan wrote off a substantial number of the hours he performed on tasks for them. Noonan's expertise and independent work on the matter may very well have been more efficient than billing an associate to familiarize themselves with the facts, do the same work over a lengthier amount of time, and then have Noonan review their work. *See Moreno,* 534 F.3d at 1114–15 ("The district court may have been right that a larger firm would employ junior associates who bill at a lower rate than plaintiff's counsel, but a larger firm would also employ a partner-likely billing at a higher rate than plaintiff's counsel-to supervise them ... lead counsel can doubtless complete the job more quickly, being better informed as to which documents are likely to be irrelevant, and which need to be examined closely. Modeling law firm economics drifts far afield of the *Hensley* calculus ...."). The court does not believe any of the aforementioned work performed by Noonan is below his skill level or necessitated the use of an associate to keep costs down, even if other firms would not have billed that way and accordingly will not change the billing rate for these tasks.

Plaintiffs further contend that Noonan billed several tasks that could be performed by a paralegal at partner rates. "[P]aralegal work should be billed at an appropriate rate, regardless of the status of the person actually undertaking the work." *Robinson,* 2007 WL 1300450, at *2. Several tasks undertaken by Noonan should be billed at a paralegal rate, including his preparation of a discovery timetable (7/22/08), case scheduling with the courtroom deputy (8/21/08), document organization (2/6/09), and correspondence over deposition dates (8/21/09). *See id.* (including "preparing cover sheets, ... e-filing documents, ... scheduling matters, ... preparing boilerplate documents, and organizing case files" as paralegal tasks). Accordingly, the court will reduce the 3.6 hours spent on these tasks to a $75 per hour rate.

*8 Plaintiffs finally argue that the court should eliminate tasks billed by paralegals that are purely sec-

retarial or clerical from its lodestar calculation. As this court has previously explained, secretarial tasks are generally not recoverable as attorney's fees because "the salaries and benefits paid to support staff are a part of the usual and ordinary expenses of an attorney in his practice, and are properly classified as overhead." *Eiden,* 407 F.Supp.2d at 1171 (internal quotation marks omitted); *see also Ketih v. Volpe,* 644 F.Supp. 1312, 1316 (C.D.Cal.1986). A number of tasks performed by defendants' paralegals appear to have been clerical or secretarial in nature, such as copying (5/22/08), Bates labeling (5/22/08), and scanning documents (8/5/09). Accordingly, the court will deduct 4.6 hours of paralegal work from its lodestar calculation.

3. *Hours Reasonably Expended*

Plaintiffs also object to some of the hours expended by defendants' counsel. Plaintiffs first object to defendants billing for time spent by Noonan consulting with fellow partner Brad Benbrook. While excessive conferencing with other attorneys can be prone to abuse, the amount of conferencing in this case is quite small; only 8.3 hours were billed for conferences over case strategy between Benbrook and Noonan. (*See* Noonan Decl. ¶¶ 39–41.) Consultation between lawyers can be an invaluable resource, especially in a case staffed as leanly as this one, where Noonan did a substantial portion of the work without assistance of other attorneys to try to minimize costs. The court does not find the level of consultation between Benbrook and Noonan unreasonable, and accordingly will not eliminate Benbrook's hours from the lodestar.

Plaintiffs also object to defendants' request for $1,200 in fees for defendants' Georgia counsel, Donald Taliaferro and for defendants' additional request for $16,440 worth of work filing this fee motion and responding to plaintiffs' opposition. Defendants have not indicated what work Mr. Taliaferro performed for this case, how long he worked, or any billing documentation to that effect. Accordingly, defendants have not met their burden such that the court may grant them attorney's fees for Mr. Taliafero's work. However, plaintiffs have not supplied a valid reason for the court to deny defendants' request for attorney's fees incurred in filing the motion and responding to plaintiffs' opposition. Given the protracted nature of the litigation and the response required by plaintiffs' vigorous opposition to the original fee motion, the additional work performed by defendants' counsel is not unreasonable. Accordingly, the court will grant defendants their request for fees incurred in preparing their original motion and responding to plaintiffs' opposition thereto.[FN3]

> FN3. While the court will award defendants these attorney's fees, it will reduce them in accordance with the hours supplied in the amended billing statements and appropriate prevailing rates identified in this Order.

B. *Adjusting the Lodestar Calculation*

After calculating the lodestar, the court must decide whether to enhance or reduce the award in the light of particular factors, including the novelty and difficulty of the case, the skill displayed in presenting them, the extent the litigation precluded other employment by the attorneys, and the contingent nature of the fee award. *Ketchum,* 24 Cal.4th at 1132, 104 Cal.Rptr.2d 377, 17 P.3d 735. However, "[t]here is no hard-and-fast rule limiting the factors that may justify an exercise of judicial discretion to increase or decrease a lodestar calculation." *Thayer v. Wells Fargo Bank, N.A.,* 92 Cal.App.4th 819, 834, 112 Cal.Rptr.2d 284 (2001). While defendants urge that no adjustments are necessary, plaintiffs contend that the lodestar calculation should be reduced because defendants' billings include work on claims that are not eligible for attorney's fees and irrelevant attacks on the Yeagers' character.

*9 While some of the claims worked on by defendant are non-fee bearing claims, under California law a prevailing party may recover attorney's fees on a claim for which attorney's fees are not available if it occurs in a case where a statutory claim that allows for fees is present and the claims are so interrelated that a separate accounting for them is impossible. *See Akins v. Enter. Rent–a–Car,* 79 Cal.App.4th 1127, 1133, 94 Cal.Rptr.2d 448 (2000). This rule has explicitly been applied to section 3344(a) claims. *See, e.g. Kriby,* 144 Cal.App.4th at 62 n. 7, 50 Cal.Rptr.3d 607; *Love v. Mail on Sunday,* No. Civ. 05–2298 ABC(PJWX), 2007 WL

2709975, at *3 (C.D.Cal. Sept.7, 2007). The issues in this action were so intertwined that apportionment between the claims would be nearly impossible. Plaintiffs' claims all related to the same set of facts—namely that defendants allegedly used Yeager's name and likeliness without his permission. Plaintiffs' claims for breach of the common law right to privacy, unfair business practices, and violations of section 3344 , the Lanham Act, and the California False Advertising Act were all based upon the same alleged misconduct by the Bowlins.

Plaintiffs' subsequent common law claims for fraud, breach of contract, accounting, unjust enrichment, and equitable rescission were also all intertwined with defendants' defenses to plaintiffs' misappropriation of likeness based claims. One of the elements for a claim for violation of section 3344 is a lack of consent. Cal. Civ.Code § 3344. Plaintiffs' allegations under section 3344 were premised on plaintiffs' lack of consent to sell items with General Yeagers' name and likeness because of contract breaches and fraud on the part of defendants. Plaintiffs could not prove their case without proving that defendants either engaged in the fraudulent conduct or breached an agreement with plaintiffs. Plaintiffs' claims for accounting, unjust enrichment, and equitable rescission were similarly all based upon defendants' alleged misappropriation, breach of contract, and fraud. Finally, defendants are not requesting reimbursement for any attorney's fees relating to research on any counterclaims defendants may have had. Accordingly, the court will not reduce the lodestar amount because plaintiffs' claims were so intertwined that apportionment between them by defendants is not required.

Plaintiffs also contend that the lodestar should be reduced because defendants' motion for summary judgment contained a number of allegedly irrelevant facts in an attempt to undermine the character of General Yeager and Victoria Yeager and prejudice the court. While some facts in defendants' motion for summary judgment were irrelevant, the suggestion that defendants were attempting to prejudice the court are unfounded. Such concerns may be valid if defendants' statements were made at trial in front of a jury; however, the court has both the obligation and experience to dismiss irrelevant statements and objectively decide the law at summary judgment. Research on the credibility of witnesses is not irrelevant for trial and accordingly was a relevant area of research for defendants. Defendants' research on other court actions involving General Yeager also proved relevant for defendants' statute of limitations defense, since it helped prove that plaintiffs were on notice of claims they had against defendants. (*See* Order re: Mot. Summary Judgment at 27.) The court does not believe that defendants have attempted to "use the court processes for an improper purpose" and therefore declines to reduce the lodestar amount on that ground.

***10** After reviewing the briefs, depositions, and other evidence before the court, the court finds that given the complexity of the case and defendants' good-faith efforts to avoid and write off costs that the lodestar amount need not be increased or reduced.

C. *Costs*

Defendants also ask for a number of costs not previously included in their Bill of Costs. Out-of-pocket costs and expenses incurred by an attorney that would normally be charged to a fee-paying client are recoverable as attorney's fees. *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir.1990). Plaintiffs do not object to defendants' request for reimbursement of $1,586.58 for costs associated with counsel's travel to depositions. The court will accordingly award these costs. *See Foothill–De Anza Cmty. College Dist. v. Emerich,* 158 Cal.App.4th 11, 30, 69 Cal.Rptr.3d 678 (2007).

Plaintiffs do object, however, to defendants' request for $2,610.50 in Westlaw charges associated with legal research in the case. A number of courts have allowed electronic legal research to be charged as attorney's fees. *See Trustees of Const. Indus. & Laborers Health & Welfare Trust v. Redland Ins.* Co., 460 F.3d 1253, 1258–59 (9th Cir., 2006); *Cal. Common Cause v. Duffy,* 200 Cal.App.3d 730, 753, 246 Cal.Rptr. 285 (1987). The billing statements submitted to the court indicate the amount defendants' were charged for research at each billing date. Noonan's declaration also indicates

that each client has an individualized billing number so that the firm can separate Westlaw costs among clients. (Noonan Decl. ¶ 59.) Accordingly, the court finds plaintiffs' concern that defendants' counsel may be receiving more money than they pay for the service unfounded and will award the Westlaw charges to defendants.

Defendants finally request that $2,740 in costs initially denied by the court as part of their bill of costs be awarded as attorney's fees. Costs rejected as taxable costs in a bill of costs may be awarded as attorney's fees may be recovered as attorney's fees. *See United Steelworkers of Am.*, 896 F.2d at 407. Plaintiffs have not objected to or provided any reason why the court should deny defendants' request. Accordingly, the court will award the costs previously denied by the court in defendants' bill of costs as attorney's fees.

III. *Conclusion*

Based on the foregoing discussion, defendants will be awarded the following:

A. Fees

Lodestar Calculation

Person	Rate	Hours	=
Noonan	$400	630.2	$252,080.00
Benbrook	$400	8.3	$3,320.00
Croxall	$150	32.0	$4,800.00
Kellogg/Nelson	$75	131.9	$9,892.50
			$270,092.50

Deductions:

A.	Partner Doing Paralegal Work -$1,170.00
B.	Paralegals Doing Clerical Work -$345.00

Total: $268,677.50

B. Costs

Item	Amount
Deposition Travel	$1,568.58
Westlaw fees	$2,610.50
Previously Denied Costs	$2,740.00

Total: $6,919.08

***11** IT IS THEREFORE ORDERED that defendants' motion for attorney's fees and costs be, and the same hereby is, GRANTED in the amount of $275,596.58.

E.D.Cal.,2010.
Yeager v. Bowlin
Not Reported in F.Supp.2d, 2010 WL 2303273 (E.D.Cal.)

END OF DOCUMENT

PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 444 South Flower Street, Suite 2400, Los Angeles, California 90071-2953. On June 25, 2012, I served a copy of the within document(s):

COMPENDIUM OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF DEFENDANT CITY OF BURBANK'S OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEYS' FEES

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☒ by placing the document(s) listed above in a sealed OVERNITE EXPRESS envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an OVERNITE EXPRESS agent for delivery.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 25, 2012, at Los Angeles, California.

/s/

Lisa J. Villarroel

SERVICE LIST
Taylor v. Burbank
LASC, Case No. BC422252

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